COPY SUPREME COURT COPY

IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DAVID SCOTT DANIELS, Defendant and Appellant.	No. S095868 (Sacramento County Sup. Ct. No. 99F10432)

SUPREME COURT
FILED
JAN - 4 2012
Frederick K. Ohlrich Clerk
Deputy

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Superior Court of the State of California for the County of Sacramento

HONORABLE JAMES L. LONG

MICHAEL J. HERSEK
State Public Defender

GAIL R. WEINHEIMER
State Bar No. 58589
Senior Deputy State Public Defender

KATE LAGRANDE CHATFIELD
State Bar No. 245403

221 Main Street, 10th Floor
San Francisco, California 94105
Telephone: (415) 904-5600
Weinheimer@ospd.ca.gov

Attorneys for Appellant

DEATH PENALTY

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

STATE CASES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

CONSTITUTIONS

COURT RULES

Federal Court Rules

State Court Rules

TABLE OF AUTHORITIES

Page(s)

JURY INSTRUCTION

STATUTES

TABLE OF AUTHORITIES

TEXTS AND OTHER AUTHORITIES

INTRODUCTION

The Sixth Amendment guarantees a citizen charged with a criminal offense the right to the assistance of counsel, to confrontation and to present a defense. These rights operate together to guarantee the fairness of the criminal justice system and the reliability of its judgments.

> '[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. 'The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.'. . . It is that "very premise" that underlies and gives meaning to the Sixth Amendment. It 'is meant to assure fairness in the adversary criminal process.' [Citations omitted.]

(*United States v. Cronic* (1984) 466 U.S. 648, 655-656.) If the prosecution's case is not subjected to the "crucible of meaningful adversarial testing" (*id.* at p. 656), there can be no confidence in the reliability of the judgment.

The effective functioning of the adversary system is even more important in a capital case, where "the Eighth Amendment requires a greater degree of accuracy and fact finding than would be true in a noncapital case." (*Gilmore v. Taylor* (1995) 508 U.S. 333, 342; *Woodson v North Carolina* (1976) 428 U.S. 280, 305 ["the penalty of death is qualitatively different from a sentence of imprisonment, however long . . . Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case"]; *Beck v. Alabama* (1980) 447 U.S. 625, 637 [because of the "significant constitutional difference between the death penalty and lesser punishments," Supreme Court will invalidate procedural

rules that diminish the reliability of the guilt determination in capital cases].)

In this case, however, the Sixth Amendment and state law guarantees of reliability and accuracy were wholly absent. Following a preliminary hearing based largely on hearsay evidence, appellant was permitted to waive counsel and a jury trial on the issue of his guilt of capital murder and the appropriate penalty, without receiving adequate warnings about the nature of the rights he was waiving. Then, in violation of the California statute designed to ensure the reliability of a death judgment, appellant was permitted to stand mute at the guilt and penalty phase of his trial. As a result, he was convicted of capital murder and sentenced to death without any cross-examination of the prosecution's witnesses or scrutiny of the evidence against him, without the presentation of any evidence in defense or mitigation, without any argument in support of a sentence less than death, and without consideration of the modicum of mitigating evidence contained in the facts presented by the prosecution. Finally, no independent determination of the propriety of imposing a death sentence was made.

"'While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators.'" (*United States v. Cronic, supra,* 456 U.S. at p. 656, quoting *United States ex re. Williams v. Twomey* (7th Cir. 1975) 510 F.2d 634, 640.) Because there was no adversarial process at all and no independent determination that death was the appropriate penalty, this Court can have no confidence in the judgment, and appellant's conviction of capital murder and the death judgment must be set aside.

STATEMENT OF THE CASE

On December 30, 1999, the Sacramento District Attorney requested an arrest warrant for appellant, alleging that on December 28, 1999, appellant robbed Ray Jedkins and LeWayne Carolina in their apartment, killed LeWayne Carolina during the course of this robbery, and attempted to kill Tamarra Hillian. (1 CT 23-31.)[1]

On January 2, 2000, following a police pursuit and traffic accident that resulted in the death of LaTanya McCoy, appellant was arrested. (2 RTS[2] 209, 220.) On January 11, 2000, appellant was arraigned in his hospital room at the University of California, Davis, Medical Center, where he was being treated for the gunshot wounds he received at the time of his arrest, and the Sacramento Public Defender was appointed to represent him. (1 CT 38-48.) The district attorney filed an amended complaint on March 3, 2000, charging appellant with sixteen counts of armed robbery, one count of first degree burglary, two counts of driving a stolen vehicle, one count of evading police, two murders, each with special circumstances, and two counts of attempted murder. (1 CT 64-77.) On May 24, 2000, through his attorneys, appellant entered a not guilty plea, and denied all allegations and enhancements. Appellant initially refused to waive time but later changed his mind. (1 CT 4; 1 RTL 37-38, 1 RTL 40-41.) On August 7, 2000, appellant told the court he wished to plead guilty to all the charges. (1 RTL

---

[1] "CT" refers to the Clerk's Transcript, and "ACT" refers to the Augmented Clerk's Transcript.

[2] As the Sacramento court clerk designated the preliminary hearing transcript as Reporter's Transcript in the Lower Court and the trial court proceedings as Reporter's Transcript in the Superior Court, appellant will refer to them as "RTL" and "RTS."

44-45; 1 CT 136-138.) However, because appellant was charged with death-eligible offenses and his counsel did not consent, the court refused to permit him to plead guilty. (1 RTL 44-45.)

A preliminary hearing was held on August 21, 22, 23, and 24, 2000 before Judge Crossland. (1 CT 5.) Pursuant to Penal Code section 859b, the prosecution relied solely on the hearsay testimony of police officers to prove the charges arising from the Carolina homicide (Counts 12 through 16) and seven of the charged robberies, and in part on hearsay testimony to support the charges surrounding the McCoy homicide (Counts 20 through 22). (1 RTL 48-284; 2 RTL 285-392.) On August 24, 2000, appellant was held to answer on 22 of the 24 charges and the amended complaint was deemed an Information. (1 CT 5.)

On September 1, 2000, at appellant's arraignment in Superior Court, the Public Defender's Office was re-appointed to represent appellant. (1 CT 168-179.) Appellant did not waive his right to a speedy trial, but the court allowed his counsel to waive time on his behalf. (1 RTS 11.) On December 20, 2000, following the receipt of appellant's letter asking to plead guilty and to represent himself (1 CT 180), Judge Gary Ransom granted appellant's request to proceed in pro per. (1 RTS 12-16.)

On January 5, 2001, appellant's case was sent to Judge James L. Long for all purposes. (1 RTS 17.) An amended information was filed, charging appellant with one count of robbery in violation of Penal Code section 211[3] (Count 1); thirteen counts of robbery in violation of section 211 with allegations of personal use of a firearm in violation of section

---

[3] All statutory references are to the Penal Code, unless otherwise noted.

12022.53, subdivision (b) (Counts 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, and 17); two counts of murder in violation of section 187, subdivision (a) (Counts 12 and 21); two counts of attempted murder in violation of sections 664 and 187, subdivision (a) (Counts 15 and 22); one count of first degree burglary in violation of section 459 with an allegation of great bodily injury caused by a firearm (section 12022.53 (d)) (Count 16); one count of auto robbery in violation of section 215, subdivision (a), with an allegation of personal use of a firearm in violation of section 12022.53, subdivision (b) (Count 18); one count of driving a stolen vehicle in violation of Vehicle Code section 10851(a) (Count 19); and one count of evading police officers in violation of Vehicle Code section 2800.3 (Count 20). Special circumstances were alleged for both murders, pursuant to section 190.2, subdivision (a)(17), a murder committed during the course of a robbery or a burglary (Count 12), and section 190.2, subdivision (a)(3), multiple murders (Count 21). Two prior convictions were alleged under the Three Strikes sentencing scheme (sections 667 and 1170.12), and notice was given that nine of the counts were serious and/or violent felonies pursuant to sections 667 and 1192.7. (1 CT 194-205.) In addition to the amended information, the district attorney also filed a memorandum listing the evidence he intended to present in aggravation at the penalty phase. (1 RT 61-62; 1 CT 258-259.)

At the January 5, 2000 arraignment on the amended Information, appellant again waived his right to counsel, declined advisory counsel, and declined the services of a defense investigator. (1 RTS 19-20, 34-42, 47.) Appellant also waived his right to a jury trial at both the guilt and penalty phases of the trial and again expressed a desire to plead guilty to all charges. (1 RTS 43-44, 47-48.) However, because special circumstances

were alleged, the court did not accept appellant's guilty plea to any of the counts related to the two alleged murders and attempted murders. (1 RTS 48 -50.) The district attorney proposed that appellant be allowed to plead guilty to Counts 1-11 and Counts 17-19; the pleas would be open and not the result of a negotiated disposition. (1 RTS 47-51.) Appellant gave the court permission to read the preliminary hearing transcripts to allow the court to determine the factual basis for the pleas prior to accepting them. (1 RTS 60-62.) The district attorney also stated that he would ask the court to take notice of the facts underlying the crimes to which appellant was pleading as circumstances in aggravation at the penalty phase of the trial. (1 RTS 52.)

Thereafter, on January 8, 2001, after the court read the preliminary hearing transcript, appellant pled guilty to Count 1; pled guilty to and admitted the enhancements in Counts 2 to 11, 18, and 19; and admitted both prior convictions. (1 RTS 68-76.) The district attorney, at the court's suggestion, dismissed one of the armed robberies, Count 17, and the 12022.53, subdivision (b) enhancement attached to that count based on the insufficiency of the evidence presented at the preliminary hearing. (1 RTS 65-66.)

On January 16, 2001, appellant proceeded to court trial on the remaining counts. (1 RTS 79.) The prosecution presented its case on January 16 and 17, 2001. (1 RTS 91-265.) Appellant presented no evidence in his defense, did not question any of the prosecution witnesses, did not object to the presentation of any evidence by the prosecution, and did not present any argument in his defense. On January 18, 2001, the district attorney dismissed the allegation of great bodily injury attached to Count 16 (the robbery of Ray Jedkins) and presented argument on the

remaining counts and enhancements. (2 RTS 288-302.)

On January 19, 2001, the trial court found appellant guilty on all counts tried (Counts 12-16 and 20-22), and found true all allegations and enhancements. (2 RTS 307-314.) The court fixed the degree of murder in Count 12 as first degree (2 RTS 314) and found true the two special circumstances attached to this count – that the murder was committed while appellant was engaged in the commission of a robbery and burglary. (2 RTS 308.) As to the other homicide count, Count 21, the court fixed the degree of murder as second degree under two theories: 1) a second degree felony-murder theory, supported by the finding that the violation of Vehicle Code section 2800.3 was an inherently dangerous felony and 2) an implied malice murder theory, finding that the murder involved an intentional act, the natural consequences of which were dangerous to human life. (2 RTS 312.) At the district attorney's suggestion, the court found that the second degree felony murder could also be based on an uncharged violation of Vehicle Code section 2800.2. (2 RTS 314.) The court also found true the multiple-murder special circumstance attached to Count 21. (2 RTS 312-313.)

At the end of the court's reading of its verdicts, appellant again waived his right to counsel and to a jury trial for the penalty phase, and declined the district attorney's offer of assistance in bringing witnesses to court. (2 RTS 315, 317.)

On January 23, 2001, the penalty phase of the trial began before the same court that tried the issue of guilt. (1 RTS 319, et. seq.) Over the course of the two days during which the prosecution presented its evidence, appellant did not question any witness or lodge any objections. Nor did appellant present any mitigating evidence or argument regarding the

appropriate penalty. (2 RTS 320-418.) On January 26, 2001, after the district attorney argued for the imposition of the death penalty, (2 RTS 420-451), appellant made a statement apologizing to the families of LeWayne Carolina and LaTanya McCoy. (2 RTS 451-454.)

On January 31, 2001, the court imposed the death penalty. (2 RTS 462.) On February 14, 2001, the court heard and denied appellant's automatic application for a new trial and modification of death sentence. (2 RTS 469; 2 CTS 353-357.)

On February 28, 2001, the court sentenced appellant on all counts to which he had pled guilty pre-trial as well as on all counts tried before the court. The court sentenced appellant to death on counts 12 and 21, and an indeterminate term of life without the possibility of parole for 45 years, consecutive to an indeterminate term of 441 years to life, to be served consecutively to a determinate term of 125 years on the non-capital convictions. (2 RTS 513.)[4]

---

[4] On Counts 1 through 11 and Count 14, the violations of section 211, appellant was sentenced to state prison for 25 years to life on each count, to be served consecutively and with an additional consecutive ten-year term as to Counts 2 through 11 and 14, pursuant to section 12022.53, subdivision (b). (2 RTS 511.) Appellant was sentenced to death on Counts 12 and 21, with an indeterminate term of 25 years to life for the 12022.53, subdivision (d) enhancement to Count 12. (2 RTS 510.) On Count 13, a violation of sections 664 and 211, the court sentenced appellant to 33 years to life, plus 25 years to life for the firearm enhancement, which sentence was stayed pursuant to section 654, as the criminal conduct alleged in that count formed the basis for the special circumstance finding in Count 12. (2 RTS 512.) Appellant was sentenced to 39 years to life for the attempted murder of Tamarra Hillian (Count 15), plus an additional consecutive term of 25 years to life for the firearm use enhancement. (2 RTS 511.) On Count 16, the burglary of the Jedkins and Carolina apartment, appellant was sentenced to 36 years to life and 25 years to life for the firearm

STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death. (Pen. Code, § 1239.)

STATEMENT OF FACTS

I. Guilt Phase

A. The Robberies and Carjacking

From November 26, 1999 through January 2, 2000, appellant David Scott Daniels committed a number of armed robberies of businesses in Sacramento. (1 RTS 69-75.) In general, the modus operandi of each robbery was similar – he would enter a store, show the clerk a gun, and ask for money. (1 RTL 95-96, 177-178, 189-190, 192-194, 253-256; 2 RTL 286-288, 293-294, 309-310, 356-359, 380-381.) On one occasion, he led a customer and clerk to the back of a store, wrapped cable wire that he found in the store loosely around them, took twenty-five dollars from the customer, and then took money from the store's register. (1 RTL 347-349, 353-354.) Many witnesses reported that he appeared to be under the

---

enhancement, which sentence was stayed under section 654. (2 RTS 512.) On Count 18, the violation of section 215, subdivision (a), the court sentenced appellant to a term of 27 years to life with an additional ten-year term pursuant to section 12022.53, subdivision (b). (2 RTS 511.) On Count 19, the violation of Vehicle Code section 10851, subdivision (a), appellant was sentenced to prison for 25 years to life, which sentence was stayed, as the violation was charged in the alternative to Count 18. (2 RTS 512-513.) On Count 20, a violation of Vehicle Code section 2800.3, appellant was sentenced to 25 years to life, stayed by the court as Count 20 and 21 comprised an indivisible transaction with a single criminal objective. (2 RTS 513). As to Count 22, the attempted premeditated murder of Officer Weinrich, appellant was sentenced to life with no parole for 45 years and with an additional 25 years to life for the firearm enhancement. (2 RTS510.)

influence of drugs during these robberies (1 RTL 252, 259, 263, 268), and his associates at the time, Jennifer O'Neal and Martina Daniels, both testified at his trial that when they were with him, he smoked large amounts of crack cocaine. (1 RTS 154, 192.) On January 1, 2000, appellant committed a carjacking and drove the stolen vehicle during the police pursuit the next day. (1 RTL 104-106, 228-230, 233.)

As stated above, prior to his court trial, appellant pleaded guilty to all of the above offenses. (Counts 1 to 11, 18, and 19). (1 RTS 69-75.)

B. LeWayne Carolina Homicide, December 28, 1999

Testimony presented to the court regarding appellant's actions prior to, during, and after LeWayne Carolina's homicide came from three women, only one of whom, Tamarra Hillian, was present in the apartment during the shooting that resulted in Carolina's death. The other two women, Jennifer O'Neal and Martina Daniels, testified about appellant's actions prior to and following Carolina's homicide. To the extent they testified about what occurred in the apartment, it was based on what appellant allegedly told them occurred, some of which testimony was stricken by the court.

1. Testimony of Tamarra Hillian

Tamarra Hillian testified that on the night of December 28, 1999 at around 9:00 p.m., she was visiting Ray Jedkins, a friend of hers from high school, in his apartment, which he shared with his cousin Lewayne Carolina. (1 RTS 113-115, 118.) The apartment was in a complex off Mack Road. (1 RTS 113.) Although a police detective testified that there were baggies of marijuana and cash in the apartment (1 RTS 96-97; Exhibit 6, 29), Hillian testified she was not aware of marijuana sales from the apartment. (1 RTS 127.)

As Hillian was sitting in the living room of the apartment, there was a knock on the door. Jedkins answered the door and spoke with appellant, who was alone, at the door before letting him into the apartment. (1 RTS 116-117.) Appellant, Jedkins, and Carolina spoke in the kitchen of the apartment; Hillian could not hear the content of the conversation. (1 RTS 119.) Appellant was walking toward the front door when he asked to use the restroom. (1 RTS 120.) Appellant then returned from the hallway holding a gun and asked Jedkins, who was then sitting next to Hillian in the living room, for money. (1 RTS 121) Jedkins gave appellant a wad of money from his pocket, appellant took the money, and Hillian then heard gunshots and saw Jedkins trying to climb out the window. (1 RTS 124.) Hillian testified that she never saw appellant point a gun at her. (1 RTS 125, 128.) The prosecutor did not ask Hillian whether appellant ever said anything to her at all.

After appellant left the apartment, Hillian stood up and realized she had been shot in the hand and leg. (1 RTS 125.) When she attempted to call 911 from the phone in the kitchen she saw that Carolina, who had been in the kitchen, had been fatally shot. (2 RTS 125.) Jedkins, who had jumped out of the living room window when the gunshots started, returned to the apartment and called 911. (1 RTS 126.)[5]

2. Testimony of Martina Daniels

Martina Daniels[6] testified that on the evening of December 28,

---

[5] The prosecutor did not call Jedkins to testify at the preliminary hearing or at the court trial.

[6] Because Martina Daniels and the defendant have the same last name, although they are not related, Martina Daniels will be referred to by her first name.

1999, appellant came to her house with a woman named Marcie[7], another woman whose name she did not know[8], and O'Neal's young daughter. (1 RTS 142.) Martina and her friend, Lamar Alexander, joined the group in the car appellant was driving. (1 RTS 144.)

According to Martina, appellant was driving when he made a u-turn on Mack Road and drove into Stonegate Apartments. (1 RTS 145). Appellant parked the car in a stall in the lot and the two men, Alexander and appellant, exited the car, while the three women and young girl waited in the car. (1 RTS 146.) Alexander came back to the car first; according to Martina, when he returned, he appeared very scared and was praying. (1 RTS 147.) Alexander did not say where Daniels was but Daniels returned to the car a few minutes later. (1 RTS 148.) Daniels drove the car away from the complex to Martina's house, swerving and appearing to nod off as he drove. (1 RTS 148.) Once they were at Martina's house, Martina realized that appellant had been shot. (1 RTS 150.) Appellant had a gun, which Martina saw. (1 RTS 150.) In court, she identified the 9mm gun that appellant had on him at his arrest as looking similar to the gun she saw the night of December 28, 1999. (1 RTS 150.)

Because Martina wanted appellant away from her house, she drove him, O'Neal, and O'Neal's daughter to the Ramada Inn, where appellant and O'Neal were staying. (1 RTS 153-154.) At the hotel room, Martina saw another, smaller gun, which appellant told her he got from the man who shot him in the apartment. (1 RTS 159-160.) Martina testified that during

---

[7] Marcie was referred to only by her first name by Martina and by a subsequent witness, Jennifer O'Neal.

[8] This woman was Jennifer O'Neal and will be referred to as such.

this time at the hotel, she had trouble understanding appellant and he seemed to be speaking Swahili. (1 RTS 161.) She also testified that Daniels "smok[ed] on all his drugs" when he was at the hotel. (1 RTS 154.)

Initially, Martina could not recall appellant saying anything about shooting a woman or committing a robbery. (1 RTS 155.) However, the district attorney continued to question Martina about appellant's alleged statements to her regarding the shooting of a woman in the apartment. (1 RTS 162-163.) Martina stated that she heard Daniels say a girl was shot. (1 RTS 162.) Martina admitted that she could not remember what exactly Daniels had said about the girl's shooting and was assuming that appellant said he shot her because she came out of somewhere. (1 RTS 162.) The district attorney asked Martina whether appellant said he shot a girl because she would not stop screaming, to which Martina replied, "That I don't know. He probably could have said it." (1 RTS 162.) The court struck this answer. (1 RTS 163). The district attorney continued:

D.A.: "Did he say – I'm not asking you to guess. Did he say why he shot a girl?"

Martina: "Because she wouldn't stop screaming, I assumed."

D.A.: Is that something you actually heard him say?

Martina: No – no. If I did, I can't remember."

(1 RTS 163.)

3. Jennifer O'Neal's Testimony

Jennifer O'Neal, who was given immunity for her testimony against appellant, testified that on December 28, 1999 she met appellant at her mother's home at approximately 6:30 p.m. (1 RTS 170, 174.) O'Neal, O'Neal's 8-year-old daughter, and appellant rented a room at the Ramada Inn on Auburn Boulevard. (1 RTS 174). After they arrived, appellant made

phone calls in the hotel lobby. (1 RTS 175.) Appellant, O'Neal, and O'Neal's daughter left the hotel together, picked up a woman named Marcie (1 RTS 176), and then drove to Martina's house, where they picked up Martina and Lamar Alexander. (1 RTS 179.)

When they were all in the car, Alexander and appellant discussed buying drugs and Alexander told appellant of a place to go. (1 RTS 180.) Appellant drove the car and its passengers to the apartment on Mack Road. (1 RTS 182.) O'Neal described appellant, who she testified had smoked three cocaine cigarettes between 8:30 and 9:30 p.m., as "very high" and "acting hyper" when they were en route to the apartment on Mack Road. (1 RTS 193.)

Appellant returned to the car after having been shot and O'Neal described the course of events upon leaving the Stonegate Apartments: Appellant drove everyone back to Martina's house where O'Neal and the other adults attempted to treat his injuries. Appellant had bullet wounds to his left arm and on the left side of his back. (1 RTS 184.) Appellant, Martina, O'Neal, Marcie, and O'Neal's daughter returned to the Ramada Inn. (1 RTS 183.) According to O'Neal's testimony, at the hotel room, appellant told her that there were three men and a woman in the apartment at Stonegate. (1 RTS 188.) O'Neal testified that appellant said that he told the woman in the apartment, "Shut your mouth bitch or I'm going to shoot you;" that appellant said he shot a man who was sitting on the couch, and also said he shot a man in the kitchen who was shooting at appellant first. (1 RTS 188-189.)

When O'Neal could not recall what appellant told her about why he shot the people, the district attorney refreshed O'Neal's recollection with a statement she gave to Sacramento Police Detective Woodward on

December 30, 1999, at the police station. (1 RTS 190-191.) In this earlier statement, O'Neal said that appellant said he shot the man in the apartment because he was not giving him (appellant) what he wanted. (1 RTS 191.) O'Neal could not remember to what individual appellant was referring. (1 RTS 190-191.) The district attorney chose not to present evidence that O'Neal also told Detective Woodward that she was not at the Stonegate Apartments during the Carolina homicide, and that she first saw appellant when he showed up at the hotel, shot, with Martina and Marcie. (1 RTL 54-55.)

4. Crime Scene Investigation

Sacramento police officers arrived at the Stonegate apartment and collected both 9mm and .380 bullet casings. (1 RTS 94-95, 109.) Dr. Greory Reiber, the forensic pathologist who performed the autopsy of LeWayne Carolina on December 29, 1999, testified that Carolina had two gunshot wounds: a fatal wound to his head and a superficial graze wound on the left side of his back. (1 RTS 132, 135.) Dr. Reiber stated that there was no soot or gunpowder on Carolina's head, indicating that the gun was fired from a distance greater than twelve to eighteen inches. (1 RTS 135.)

C. McCoy Homicide, January 2, 2000.

An arrest warrant was issued for appellant on December 30, 1999 for the killing of LeWayne Carolina. (1 CTS 23-31.) On the morning of January 2, 2000, Sacramento Police Detective Michael Kaye was on surveillance in front of the residence of a woman who Kaye said was a witness to a December homicide.[9] (1 RTS 227.) At 6:00 a.m. that morning,

---

[9] Kaye never said the name of the woman, only that the address was 7912 Whitestag Drive. (1 RTS 227.) Martina Daniels testified that she lived at 7912 Whitestack Drive. (1 RTS 142.)

a silver Camaro approached the residence and then drove off, with Kaye following. (1 RTS 228-229.) Kaye broadcast the Camaro's description, then lost sight of the car. However, marked police cars nearby saw the car and resumed the pursuit. (1 RTS 229; 1 RTS 199.) The Camaro, which was being driven by appellant, struck another car, driven by LaTanya McCoy, which burst into flames, killing McCoy. (1 RTS 137, 205-206, 217, 230.)

The Camaro, badly damaged, veered off the road and came to rest. (1 RTS 209, 215, 218, 229, 235.) According to Officer Weinrich, appellant told officers that he was pinned in the car. (1 RTS 218.) When officers approached, appellant shot a 9mm gun, hitting Officer Weinrich in the chest and upper thigh. (1 RTS 222-223, 238.) Officers returned fire and appellant was shot multiple times. (1 RTS 222.)

II. Penalty Phase

A. Statements by Defendant

The penalty trial began on January 23, 2001. The prosecution began its case by introducing statements allegedly made by appellant on January 19, 2000, in which he purported to threaten officers from his hospital bed. (2 RTS 322-323.) The district attorney argued that these statements constituted an uncharged violation of section 69 (obstructing or resisting officer by means of threat or violence). (2 RTS 443.)

Sheriff's deputies at the jail testified regarding two letters written by appellant and confiscated from the outgoing mail. One letter was six pages and was written on April 19, 2000 to a woman named Nikki. (ACT 851-856; 2 RTS 324-328.) Appellant described his situation and his wish that he would have died instead of Ms. McCoy and urged Nikki to find her God. (ACT 856.) In the context of explaining that he was not afraid to die and

not afraid of getting the death penalty, appellant stated he wished he had killed the officers that he shot. (ACT 853.) The other was an eleven page letter appellant wrote to his aunt, which was collected by a jail deputy on June 18, 2000 from appellant, written to his aunt. (ACT 805-815; 2 RTS 329-332). This letter included a printout labeled "Daniels Investigation Time Line" on which appellant made statements admitting and describing particular crimes with which he was charged or which became the subject of his penalty phase trial. (ACT 805-815; 2 RTS 329-332.)

B. Prior Convictions

The district attorney introduced three certified copies of appellant's prior convictions: a conviction for a violation of Health and Safety Code section 11350, which conviction occurred on March 16, 1988 in San Francisco (2 RTS 333; ACT 836-850); a conviction for a violation of Health and Safety Code section 11352 on October 22, 1990 in San Francisco (2 RTS 333; ACT 826-834); and a conviction for a second degree burglary (section 459) in Sacramento on February 19, 1998. (2 RTS 333; ACT 817-825.) These prior convictions did not include the two prior conviction alleged in the Information and which appellant admitted prior to trial on January 5, 2001. (2 RTS 334)

C. Uncharged Crimes

1. December 11, 1999

Keisha Taylor testified that on December 11, 1999, she was working as a bank teller at Washington Mutual Bank in Stockton when appellant approached her teller window and asked her for wrappers for quarters. Taylor left her window to retrieve the wrappers. When she returned, appellant pointed a gun at her and Taylor observed another teller giving appellant money. Taylor estimated that appellant left the bank with

approximately six thousand dollars. (2 RTS 373-376.)

2. December 22, 1999

Vorn Chan and his daughter Junda Chan were working December 22, 1999, at Lim's Market in Stockton when a man with long hair and a bandana showed a gun to Junda and told her he did not want to hurt her, but he needed a car. (2 RTS 360, 269.) Junda went to her father, who gave the man keys to his son-in-law's pick up truck, the necklace he was wearing, and his watch. (2 RTS 363.) Vorn reported that after the man left the store, he followed him outside and heard gunshots. (2 RTS 365). Junda, however, did not hear shots fired. (2 RTS 370.) Although neither Vorn nor Junda Chan were able to identify appellant as the man who had committed the robbery, the district attorney argued that appellant admitted as much in his June letter to his aunt. (2 RTS 424.)

3. December 30, 1999

On December 30, 1999, appellant and an unnamed woman were speeding on Highway 165 when appellant's car missed a turn and rolled off the road. (2 RTS 337.) According to witness Manual Reyes, when appellant emerged from the car he was "really loopy, like his equilibrium was off, he was not there, spaced out." (2 RTS 339.) Shantel Little was driving by in her mother's Camaro and stopped to offer assistance. (2 RTS 341, 402.) Appellant and his passenger walked across the street to her car, pointed a gun at her, and told her to move over. (2 RTS 343, 403.) Instead, Little exited the car and appellant and his passenger got in and drove off. (2 RTS 403.)

A Merced County Sheriff's deputy pursued the Camaro until he lost sight of the car. (2 RTS 347-349.) However, in Turlock two police officers, Officers Bothe and Bertram, resumed the pursuit in their patrol

cars until the Camaro crashed into a Chevy Tahoe. (2 RTS 381-384.) Appellant exited the Camaro and fired a gun at the officers. (2 RTS 386-388.) The woman passenger, who was injured, was arrested at the scene. (2 RTS 388, 397.) Appellant fled on foot. (2 RTS 388, 397.) Officers later collected shell casings at the scene of the collision. (2 RTS 398-400.) According to firearms expert Bruce Moran, these shell casings came from the Intratec 9mm found with appellant when he was arrested on January 2, 2000. (2 RTS 378-380.)

Jose Campos testified that on the evening of December 30, 1999, appellant walked into the garage of Campos' house in Turlock, held up a gun, and asked Campos for the keys to his car. (2 RTS 351-353.) Campos retrieved the keys from inside his house, gave them to appellant, and returned into his house. (2 RTS 354.) When Campos returned to his garage, Campos' car was gone. (2 RTS 355.)

D. The Prosecutor's Argument and Appellant's Statements to the Families of the Victims

The prosecutor argued that the number of appellant's crimes, the circumstances of his shooting at officers, and his statements in his letters evincing a lack of remorse for the officers' shooting merited the imposition of the death penalty. (2 RTS 420-451.) The district attorney acknowledged that if it were not for the shooting of the officers, "this might be a case where life without the possibility of parole would be appropriate for this man." (2 RTS 449.) However, the district attorney retreated from this argument after the court asked him, "You are not suggesting to me, maybe you are, that this would not be a death penalty type situation save his attack on police officers, are you?," to which the district attorney replied that he was not suggesting that, but that the shooting of the officers "makes it even

more crystal clear in this case and what pushes it beyond any doubt." (2 RTS 450.) The district attorney also argued that death would be a more appropriate punishment because of appellant's future dangerousness to law enforcement. (2 RTS 450.)

The court asked appellant if he had any argument to present in his defense, to which appellant replied, "At this time, Your Honor, I don't wish to – I don't have any argument, but I would like to make an open apology to the families that are present." (2 RTS 451.) In a lengthy statement, appellant then apologized to the families of Lewayne Carolina and LaTanya McCoy for their deaths and asked for their forgiveness. (2 RTS 451-454.)

E. Court's Findings and Sentence

The court found true beyond a reasonable doubt all of appellant's prior convictions. (2 RTS 456.) The court also found that all of the uncharged crimes presented during the penalty phase involved an express or implied use of force or violence, or threat of force or violence, and had been proven beyond a reasonable doubt. (2 RTS 456 - 457.) On January 31, 2001, the court announced its penalty phase verdict. The court read the statutory factors it had considered (section 190.3) in reaching its decision and imposed the death penalty without any further explanation or statement of reasons. (2 RTS 459-462.)

At the hearing on the automatic motion to modify the death verdict held on February 14, 2001, the court elaborated on its earlier decision as it related to each of the statutory factors contained in section 190.3 in light of the evidence presented at the guilt and penalty phase; the court did not read or consider the probation officer's report "or any other evidence or

information."[10] (2 RTS 464.) As to subdivision (a), the circumstances of the crime, the court found that appellant had shot Lewayne Carolina both because Carolina had shot at appellant first and because Carolina had not given appellant what he wanted. (2 RTS 465.) The court credited the hearsay statement attributed to appellant that he had shot Tamarra Hillian because she was screaming. (*Ibid.*) The court did not indicate whether this finding was based on the testimony of Jennifer O'Neal or Martina, whose latter testimony regarding the matter had been stricken. (2 RTS 162-163.) Nor did the court indicate whether, in making this finding, it had found Hillian's testimony that she never saw a gun pointed at her (1 RTS 125, 128) incredible.

The court also found subdivisions (b) and (c) aggravating, citing the robberies to which appellant pled guilty, the evidence of unadjudicated criminal activity presented at the penalty phase, and appellant's prior felony convictions. (2 RTS 465-466.) Regarding subdivisions (d) [whether the offense was committed under the influence of extreme mental or emotional disturbance], (g) [whether appellant acted under extreme duress or the substantial domination of another person], and (i) [appellant's age at the time of the offense], the court stated that no evidence had been presented and therefore these factors were neither aggravating or mitigating. (2 RTS

---

[10] In this way, the court made clear that it did not consider the facts and arguments set forth in the Amicus Curiae Memorandum in Support of Defendant/s Deemed Application for Modification and Declaration, received by the court on February 2, 2001, filed by attorney James Joseph Lynch, Jr., a criminal practitioner in Sacramento and self-described "abolitionist." (2 CT 341-352.) Among other matters, the Memorandum indicated the severity of the injuries suffered by appellant before and during his arrest and that the family members of both murder victims were opposed to the death penalty for appellant. (2 CT 343.)

466, 467, 468.)

In contrast, while the court acknowledged that evidence had been presented that was relevant to subdivisions (e) [whether the victim was a participant or consented to the homicidal act], (f) [whether appellant reasonably believed that there was moral justification or extenuation for his conduct][11] and (h) [whether appellant's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was impaired as a result of mental disease, defect or intoxication], it determined that these factors were not mitigating. (2 RTS 466-467, 468.) As to 190.3, subdivision (k), which the court quoted in its unadorned statutory form, "any other circumstance which extenuates the gravity of this crime even though it is not a legal excuse for the crime," the court found that appellant's statement to the families, which included an expression of remorse for his actions and an acceptance of responsibility for the crimes "may" have constituted a mitigating factor. (2 RTS 469.) The court also noted that appellant chose to represent himself and did not present a defense or mitigating evidence (*ibid.*), but did not indicate whether it found this mitigating.

The court then denied the motion to modify, stating that the death penalty was justified, the weight of the evidence supported the verdict and it was not contrary to the law or the evidence presented. (2 RTS 469.)

---

[11] In determining whether subdivision (f) was mitigating, the court again credited the alleged hearsay statement of appellant that he had shot Carolina because he had not given him (appellant) what he wanted in determining that appellant had not believed that he was acting in self-defense, despite having been shot by Carolina first (2 RTS 467).

I.

THE GUILT AND PENALTY JUDGMENTS MUST BE REVERSED BECAUSE THE RECORD DOES NOT AFFIRMATIVELY REFLECT A KNOWING, INTELLIGENT AND VOLUNTARY WAIVER OF THE RIGHT TO COUNSEL

A. Relevant Facts

During municipal court proceedings, appellant told the court on several occasions that he wanted to plead guilty, but was told by the court that he could not plead guilty to capital offenses without the consent of counsel. (1 RTL 20, 40, 45, 377.) At his arraignment in superior court on September 1, 2000, appellant requested permission to address the court in private but Judge Ransom refused. (1 RTS 11.) On December 7, 2000, appellant submitted a written request to Judge Ransom, again asking for permission to enter a guilty plea and also asking, for the first time, to represent himself. (1 CT 180-184.) In his letter to the court, appellant stated: "I fully understand that I am charged with the capitol [sic] offense of Murder penal code section 187 with the special circumstances." (1 CT 180.) In addition, appellant submitted a typed three-page "Notice of Motion and Motion to Act as Counsel in Pro Per (Faretta motion)" on which he printed his name in the caption; attached to the Notice was an unsigned verification and a one-page "Points and Authorities." (1 CT 181-183.)

A hearing on appellant's request was held on December 20, 2000. Appellant's trial counsel told Judge Ransom that he had explained to appellant that he could not plead guilty even if he represented himself,[12] and

---

[12] Pursuant to Penal Code section 1018, "[n]o plea of guilty for which the maximum punishment is death, or life in prison without the

the court confirmed that appellant could not "plead guilty to a death penalty case and get the death penalty." (1 RTS 12.)[13] After appellant confirmed that he still wanted "to go pro per for trial" and that he realized he was facing the death penalty (1 RTS 12-13), Judge Ransom advised him as follows:

> THE COURT: Mr. Daniels, you have a right to be represented by an attorney at all stages of the case, and if you cannot afford to hire your own attorney, the Court will appoint one to represent you. [¶] Do you understand that?
>
> THE DEFENDANT: Yes, your Honor.
>
> THE COURT: It is generally not a wise choice to represent yourself in criminal matters. [¶] Do you understand that?
>
> THE DEFENDANT: Yes, your Honor.
>
> THE COURT: Do you realize if convicted and this things [sic] goes to the ultimate conclusion, you're facing the death penalty?
>
> THE COURT: The Court cannot and will not help you present your case or grant you any special treatment. [¶] Do you understand that?
>
> THE DEFENDANT: Yes, I do.

---

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."

[13] The record does not support Judge Ransom's apparent belief that appellant wanted to plead guilty for the purpose of "get[ting] the death penalty." (1 RTS 12.) The record is silent about why appellant wanted to plead guilty. Appellant was never asked why he wished to pursue that course and did not volunteer his reasons. To the extent that any inference can be drawn, it appears that appellant wished to accept responsibility for his actions.

THE COURT: Do you realize that you will be opposed by a trained prosecutor?

DEFENDANT: Yes, your Honor.

THE COURT: You must comply with all rules of criminal procedure and evidence just as a lawyer must. [¶] Do you understand that?

DEFENDANT: Yes, I do.

THE COURT: If you are convicted, you cannot appeal based on the claim of having an incompetent lawyer, namely you?

DEFENDANT: Yes, your Honor.

THE COURT: If you are disruptive, you will be removed from the courtroom and an attorney will be brought in to finish the case. [¶] Do you understand that?

THE DEFENDANT: I do now. Yes, I do.

THE COURT: You have a right at any time to hire your own attorney, however, the Court will not delay your case to allow an attorney to prepare to represent you. [¶] Do you understand that?

THE DEFENDANT: Yes.

THE COURT: What kind of education do you have, Mr. Daniels?

THE DEFENDANT: High school.

THE COURT: Okay. You can read and write?

THE DEFENDANT: Yes, I can.

THE COURT: What do you wish to do, Mr. Daniels, in regards to your right to be represented by a lawyer?

THE DEFENDANT: I want to exercise my Faretta.

THE COURT: Do you want to represent yourself?

THE DEFENDANT: Yes, I do.

THE COURT: I'm satisfied he's doing this knowingly and intelligently. I am going to grant the motion.

(1 RTS 13-15.)[14] Judge Ransom then relieved the Public Defender and continued the case to January 5, 2001, for the purpose of confirming the previously set trial date of January 16, 2001. (1 RTS 15.)

---

[14] The court's oral warnings were limited to an almost verbatim recitation of the warnings contained in section A of the one-page Sacramento County Municipal Court form entitled "Record of Faretta Warnings," which was signed by appellant and Judge Ransom. (1 CT 186.) The offense written in the upper right hand corner of the form is simply "211 PC." (*Ibid.*)

Section A states: "Defendant has been advised personally of the following:

1. You have the right to be represented by an attorney at all stages of this case and if you cannot afford your own attorney the Court will appoint one to represent you. [¶] 2. It is generally not a wise choice to represent yourself in a criminal matter. [¶] 3. Penalties for offense if found guilty are [blank]. [¶] 4. The Court cannot help you present your case or grant you any special treatment. [¶] 5. You will be opposed by a trained prosecutor. [¶] 6. You must comply with all the rules of Criminal Procedure and Evidence just as an attorney must. [¶] 7. If you are convicted you cannot appeal based on the claim that you were not competent to represent yourself. [¶] 8. If you are disruptive you will be removed from the courtroom and an attorney will be brought in to finish your case. [¶] 9. You have the right at any time to hire your own attorney. However, the Court will not delay your case to allow an attorney to prepare to represent you." (1 CT 186; emphasis in original.) The printed date on the bottom of the form is "3-85."

On January 5, 2001, the case was assigned to Judge Long for all purposes, including trial. (1 RTS 17.) At the outset of the proceedings, Judge Long confirmed that appellant was representing himself and had been advised of the "pitfalls" of self-representation by Judge Ransom. (1 RTS 19.) Judge Long then arraigned appellant on the second amended Information filed that day (1 CT 194-205; 1 RTS 19-20), reading each of the 22 charges and the sentencing enhancements in the language of the relevant code sections, as framed in the Information. (1 RTS 19-34.) Thus, he told appellant that in counts 12 and 21, the amended Information alleged that he committed "a felony, namely a violation of section 187a of the Penal Code of the State of California in that you did unlawfully and with malice aforethought murder" LeWayne Carolina and LaTanya Janelle McCoy (1 RTS 25, 31), and counts 15 and 22 alleged that appellant "did unlawfully and with malice aforethought attempt to murder" the victims. (1 RTS 27, 32.) After reading each count, Judge Long asked "Do you understand the charges" and appellant responded "yes" (1 RTS 20-34); when he finished reading the charges, Judge Long asked appellant: "Are there any questions you need to ask me relating solely to the nature of the charges that the People of the State of California have filed against you" and appellant said "no, sir." (1 RTS 34.)

Thereafter, in a series of questions framed to elicit "yes" or "no" answers, Judge Long reiterated at greater length the same warnings about the disadvantages of self-representation given by Judge Ransom. He reminded appellant that the charges were "very, very serious," and that if convicted of murder and special circumstances, a finding at the penalty phase that "the aggravating circumstances outweigh those [sic] mitigating circumstances" could result in his execution. (1 RTS 34-35.) He told

appellant that Mr. Curry, the prosecutor assigned to the case, had prosecuted a number of death penalty cases and was "probably one of the experts in this county prosecuting such cases," and asked appellant if that made any difference; appellant responded that he wished to continue representing himself. (1 RTS 35.) The Court continued:

> You understand that these are very, very serious matters and that whatever your legal training is and I don't know what that is, I am going to get into that, that you sir are placing yourself at a severe disadvantage? Do you understand that?
>
> MR. DANIELS: Yes, your Honor. I don't look at it as a disadvantage.
>
> THE COURT: You do not look at it as a disadvantage?
>
> MR. DANIELS: No.
>
> THE COURT: All right.

(1 RTS 35.) Without making any inquiry into why appellant did not believe self-representation was a disadvantage, Judge Long went on to remind appellant that he would be held to the standards of a lawyer, that the court could not assist him in any way, that the consequences of self-representation in this case were enormous, that it was never wise for an unskilled person to represent himself, and that he would not be able to question his own competency on appeal. (1 RTS 35-37.)

Unlike Judge Ransom, Judge Long also asked appellant questions about his mental state on that date. In response, appellant said that he was thinking clearly, that he knew what he was doing, that he was taking medication for nerve damage to his hand but that it was not interfering with his choice to represent himself, and that he was not under the effect of

anything else that would affect his decision. (1 RTS 37-38.)[15] In response

---

[15] The Court made the following inquiry into appellant's mental state:

> THE COURT: Let me ask you this: Do you represent to me that you are thinking clearly? Are you thinking clearly?
> MR. DANIELS: Yes, I am.
> THE COURT: And you know what you are doing?
> MR. DANIELS: Yes, I do.

(1 RTS 38.) After inquiring into appellant's level of education , the Court returned to this area:

> THE COURT: Have you ever insofar as you know, have you ever had any problem in terms of mental illness?
> MR. DANIELS: No.
> THE COURT: Are you presently taking any form of medication?
> MR. DANIELS: Yes.
> THE COURT: What do you take?
> MR. DANIELS: Neurontin.
> THE COURT: What is it?
> MR. DANIELS: Called Neurontin for nerve damage.
> THE COURT: You mean nerve damage in some part of your body?
> MR. DANIELS: Yeah, for my hand.
> THE COURT: In terms of this decision to represent yourself, is whatever medication you are taking interfering with in any way what you feel to be a choice of yours to represent yourself? Is it clouding your mind in any way?
> MR. DANIELS: No, sir.
> THE COURT: So really in terms of today you are not under the influence of any drug, narcotic, or alcohol that clouds your mind in any way in terms of this colloquy we are having relative to your representing yourself? Would that be correct?
> MR. DANIELS: No, sir.
> THE COURT: You are not under the effect of anything like that?
> MR. DANIELS: No.
>
> (1RTS 38-39.)

to the court's questions, appellant said he was 33 years old, could read and write, had graduated from high school and had been employed "off and on" as a mail room clerk. (1 RTS 38.) Although Judge Long told appellant he would inquire into his legal experience (1 RTS 35), he never did so.

In response to the court's further questions, appellant stated that no threats or promises had been made in connection with his decision. (1 RTS 40-42.) After appellant confirmed that he knew he could be put to death, Judge Long asked appellant: "Are there other areas that you think I need to explore at this time? Oh, and further, if you did want a lawyer, do you understand that I would appoint a lawyer for you and give you what additional time you need to prepare for trial? Do you understand that?" (1 RTS 41.) Appellant said "yes" in response to the second question ("do you understand that?") but did not respond to the first. (*Ibid.*)

Following a 15-minute recess to allow appellant to consider what the court had said, the court concluded its advisements with the following:

> THE COURT: All right. We are again on the record. Mr. Daniels, have you had an opportunity to think about, you know, the colloquy we have gone through relative to you representing yourself.
>
> MR. DANIELS: Yes.
>
> THE COURT: Now. Let me ask you this: You have told me that you understand the nature of all these charges and what could happen to you, right?
>
> MR. DANIELS: Yes, I understand.
>
> THE COURT: And if you wished to present a defense, that is kind of like up to you, but if you wish to do that, your mind is clear and your thoughts and you understand the charges where if you wish to do that, you feel you could do that?

MR. DANIELS: Yes, I do.

THE COURT: You do.

MR. DANIELS: Yes, I do.

(1 RTS 42.) The court then found that appellant was "competent, he understands the nature of the charges, he understands and represents that his mind is clear whereby if he wished to present a defense he would know how to do that to these charges" (1 RTS 43), and further, that appellant "understands the risks and dangers of representing himself . . . and that this choice to represent himself is done knowingly, freely and intelligently, and without any force or coercion." (*Ibid.*)

As appellant will demonstrate below, the record does not affirmatively show a knowing, intelligent and voluntary waiver of the right to counsel. Judge Ransom made no inquiry at all into appellant's understanding of the charges and Judge Long made no meaningful inquiry. Neither judge made any inquiry into appellant's legal experience or informed him of the complexities of a capital trial. Further, Judge Long ignored appellant's statement that he did not view self-representation as a disadvantage, despite the warnings he had received. As a result, the record does not demonstrate that appellant "understood the disadvantages of self-representation, including the risks and complexities of the particular case." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1070.)

B. A Valid Waiver of the Right to Counsel Requires That the Record Affirmatively Show That the Waiver Was Knowing, Intelligent and Voluntary

In *Faretta v. California* (1975) 422 U.S. 806, the United States Supreme Court held that, under the Sixth and Fourteenth Amendments, a defendant in a state criminal trial has a right to the assistance of counsel as well as a corresponding right to represent himself or herself. However, a defendant who elects to represent himself or herself may do so only after knowingly, intelligently, and voluntarily choosing to forgo the assistance of counsel. Because the Court in *Faretta* recognized a tension between the right of self-representation and its decisions holding that the Constitution requires that no accused can be convicted and imprisoned unless he has been accorded the right to the assistance of counsel,[16] it imposed a dual duty upon trial courts: first, to ascertain that a defendant who seeks to exercise the right to self-representation has knowingly and intelligently foregone the traditional benefits associated with the right to counsel, and secondarily, to ensure that the record establishes that the defendant knows what he is doing, i.e., that his choice is made with eyes open. (*Faretta v. California*, *supra*, 422 U.S. at p. 835; *Adams v. United States ex rel. McCann* (1942) 317 U.S. 269, 279.)

Although this Court has held that "no particular form of words is required in admonishing a defendant who seeks to waive counsel and elect self-representation," and that "the test is whether the record as a whole demonstrates that defendant understood the disadvantages of self-

---

[16] The *Faretta* Court recognized that the that the basic thesis of decisions such as *Argersinger v. Hamlin* (1972) 407 U.S. 25, and *Gideon v. Wainwright* (1963) 372 U.S. 335, is that the help of a lawyer is essential to assure the defendant a fair trial.

representation, including the risks and complexities of the particular case" (*People v. Koontz, supra,* 27 Cal.4th at p. 1070), it is clear that, at a minimum, a waiver of the right to counsel cannot withstand constitutional scrutiny under the Sixth and Fourteenth Amendments unless it is preceded by an inquiry and findings by the court that the defendant was both competent to stand trial and that his decision to forgo the assistance of counsel was both knowing and voluntary.[17] (*Godinez v. Moran* (1993) 509 U.S. 389, 400-401.) In assessing whether the record affirmatively reflects a constitutionally valid waiver of counsel, "the focus should be on what the defendant understood, rather than on what the court said or understood." (*United States v. Lopez- Osuna* (9th Cir. 2001) 242 F.3d 1191, 1199, cited with approval in *People v. Burgener* (2009) 46 Cal.4th 231, 241.)

Whereas the focus of a competency inquiry is to assess the defendant's mental capacity, i.e., his *ability* to understand the proceedings, "[t]he purpose of the 'knowing and voluntary' inquiry, by contrast, is to determine whether the defendant actually does understand the significance and consequences of a particular decision and whether the decision is uncoerced." (*Godinez v. Moran, supra,* 509 U.S. at p. 401, fn. 12.) In this regard, as the *Godinez* court reiterated, *Faretta* mandated that the trial court must make a defendant seeking to represent himself or herself "aware of the

---

[17] In this regard, it is important to note that the right to counsel is self-executing and persists unless the defendant affirmatively waives that right. (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464-465.) Further, courts must "indulge every reasonable inference against waiver of the right to counsel." (*People v. Stanley* (2006) 39 Cal.4th 913, 933, citing *People v. Marshall* (1997) 15 Cal.4th 1, 20; *Johnson v. Zerbst, supra,* 304 U.S. at p. 464 [courts must "indulge every reasonable presumption against waiver of fundamental constitutional rights"]; see also *Brewer v. Williams* (1977) 430 U.S. 387, 404.)

dangers and disadvantages of self-representation." (*Faretta v. California*, *supra*, 422 U.S. at p. 835.)

Moreover, given the obvious dangers of proceeding to trial without counsel, the Supreme Court has insisted that "a more searching or formal inquiry" is required when a defendant wishes to waive his right to counsel at trial because "the full dangers and disadvantages of self-representation" are more substantial and less obvious at trial than during other stages of the proceedings. (*Patterson v. Illinois* (1988) 487 U.S. 285, 299-300.) The Court has therefore "imposed the most rigorous restrictions on the information that must be conveyed to a defendant, and the procedures that must be observed before permitting him to waive his right to counsel at trial." (*Id.* at p. 298.) In support of this principle, *Patterson* referenced the decision in *Von Moltke v. Gillies* (1948) 332 U.S. 708, 723-724, holding that a valid waiver must "be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments, possible defenses to the charges and circumstances in mitigation thereof and all other facts essential to a broad consideration of the whole matter."

An even more searching inquiry is required in a capital case because of the Eighth Amendment's demand for heightened reliability in the findings leading to a death judgment. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) "[W]ith respect to [capital cases] we have held that the Eighth Amendment requires a greater degree of accuracy and fact finding than would be true in a non-capital case." (*Gilmore v. Taylor* (1995) 508 U.S. 333, 342.) Although this Court has held that a capital defendant may waive counsel and represent himself (*People v. Joseph* (1983) 34 Cal.3d 936), it has also recognized that self-representation is not intended "to

enhance the reliability of the truth determining or fact-finding process." *(People v. McDaniel* (1976) 16 Cal.3d 156, 166.) Therefore, before accepting a waiver of counsel, a trial court must conduct a full and careful inquiry to assure that a capital defendant's waiver is knowing, intelligent and voluntary.

An inquiry into a defendant's understanding of the charged offenses and possible defenses and punishments is also required by California law. In *People v. Floyd* (1970) 1 Cal.3d 694, in the context of discussing the requirement that a defendant's waiver of counsel be knowing and intelligent, the Court explained:

> Although the defendant's right to represent himself cannot be denied simply because he is unable to 'demonstrate the acumen or the learning of a skilled lawyer' [citations omitted], a defendant may waive counsel and choose to represent himself 'only if the defendant has an intelligent conception of the consequences of his act' (*People v. Carter* [1967] 66 Cal.2d 666, 670) and *understands the nature of the offense, the available pleas and defenses and the possible punishments.*

(Id. at p. 703; emphasis added.) In *People v. Koontz, supra,* 27 Cal.4th at p.1070, this Court utilized a "set of suggested advisements and inquiries designed to ensure a clear record of a defendant's knowing and intelligent waiver," articulated by the Court of Appeal in *People v. Lopez* (1977) 71 Cal.App.3d 568, 572-574. These inquiries include an "explor[ation of] the defendant's understanding of the nature of the charges, the possible defenses and possible penalties." *(People v. Lopez, supra,* 71 Cal.App.3d at p. 573.) As the *Lopez* court explained, this inquiry "serves to point up to defendant just what he is getting into and establishes beyond question that 'he knows what he is doing and his choice is made with eyes open.'

(*Faretta,* [*supra,*422 U.S.] at p. 835.)." *(Ibid.)* *Lopez* also recommended that the trial court inquire into the defendant's "education and familiarity with legal procedure." (*Id.* at p. 573.)

In *Koontz,* the record affirmatively showed that Koontz understood the nature of the charges and possible defenses.

> When the court inquired whether he knew what the charges were, defendant initially stated "a self-defense case" and "[t]he charges are irrelevant," but, on being pressed, correctly responded: "Murder in the first degree. Murder, robbery, kidnapping." Defendant indicated his defense would be that the homicide was justifiable because the victim had attacked him with a knife.

(*People v. Koontz, supra,* 27 Cal.4th at p. 884.) The record also established that Koontz had prior legal experience assisting other inmates in preparing pro se motions while serving a sentence at Folsom prison. *(Id.* at pp. 883-884.)

A review of other capital cases in which this Court has upheld waivers of the right to counsel for the guilt phase similarly include inquiries by the court designed to assess the defendant's knowledge of the elements of the capital offense and possible defenses. In *People v. Teron* (1979) 23 Cal.3d 103, 109, the trial court "interrogated defendant at length to determine if the waiver of counsel was voluntary, knowing and intelligent" and explained "at length the dangers and disadvantages" of self-representation. Further, "in response to questions, defendant demonstrated that he understood the distinction between murder and manslaughter, second degree murder and first degree murder," but he did not understand the felony murder rule. *(Ibid.)* Despite that legal deficiency, Teron confirmed he wished to represent himself.

In *People v. Blair* (2005) 36 Cal.4th 686, the defendant had

represented himself at an earlier trial for attempted murder involving the same facts underlying the capital murder charge. (*Id.* at p. 703.) During the court's inquiry, he correctly identified the charge against him and stated that it was a specific intent crime. (*Id.* at pp. 705-706.) He completed a written form that asked, among other things, "Do you know what things must be proved before you can be found guilty of the offense charged" and "Do you know what the legal defenses are to the charges against you." (*Id.* at p. 703, fn. 6.) In a second "more extensive" form, he correctly identified the charges against him and stated it was a specific intent crime. (*Id.* at pp. 705-706.) Blair nonetheless argued that because no court had orally inquired whether he understood the nature of the charges, his waiver of counsel was invalid. The Court rejected his claim, holding that the "record as a whole reflects that defendant was familiar both with the facts and the difficulties of his specific case," that he "demonstrated considerable legal knowledge," and that his waiver was knowing and intelligent. (*Id.* at p. 709.)

Consistent with *Floyd, Koontz* and *Lopez*, the California Judges Benchguide states that the court "should" take several steps, including "discuss[ing] the complexities of the case with the defendant, including the nature of the criminal proceedings, the possible outcomes, defenses and punishments" in order to "secure a voluntary and intelligent waiver." (California Center for Judicial Education and Research [CJER] Judges Benchguide 54, "Right to Counsel Issues" (rev. 2010) §54.7, p. 54-10.) Citing *People v. Lopez,* the 1998 version of Benchguide 54, issued prior to appellant's trial, stated that the court should "[d]iscuss the complexities of the case with defendant, including the nature of the criminal proceedings, the possible outcome, defenses and punishment." (CJER Benchguide 54,

"Right to Counsel Issues" (rev 1998) §54.7, p. 54-9.)

Federal courts also recognize the importance of advising a defendant who wishes to represent himself about the nature of the offenses and possible defenses to ensure a knowing and intelligent waiver of counsel. See, e.g., *Torres v. United States* (2nd Cir. 1998) 140 F.3d 392, 401 (valid waiver where court described government's burden of proof and defendant's legal advisers said they would inform him of possible defenses); *United States v. Peppers* (3rd Cir. 2002) 302 F.3d 120, 135 (court's "core responsibility" is to ascertain that the defendant understands nature of charges, potential defenses and punishments); *United States v. Carradine* (6th Cir. 2010) 621 F.3d 575, 578-579 [same]; *Bennett v. United States* (7th Cir. 1969) 413 F.2d 237, 243 [same]; *United States v. Balough* (9th Cir. 1987) 820 F.2d 1485, 1487-1488 [same]; *Maynard v. Boone* (10th Cir. 2006) 468 F.3d 665, 677 [same]; *United States v. Garey* (11th Cir. 2008) 540 F.3d 1253, 1266 [same].)

As *Floyd* made clear, requiring a showing that a defendant comprehends the nature of the charges and possible defenses is not the same as requiring a defendant to show that he has the legal ability and acumen to defend himself. (*People v. Floyd, supra,* 1 Cal.3d at pp. 702-703.) The latter, of course, is not required by *Faretta.* (*Faretta v. California, supra,* 422 U.S. at pp. 835-836.) But a defendant cannot knowingly and intelligently waive counsel if he does not comprehend what a lawyer can do for him in light of the "complexities of the particular case" (*People v. Koontz, supra,* 27 Cal.4th at p. 1070.) If the "complexities of the particular case" means anything, it must mean a rudimentary understanding of what the state must prove –the elements of the offense- and the possible defenses.

C. The Record Does Not Affirmatively Show That Appellant Made a Knowing, Intelligent and Voluntary Waiver of His Right to Counsel

An examination of the record of the hearings of December 20 and January 5 in light of the above principles shows that appellant's waiver of counsel was constitutionally invalid. Judge Ransom did not discuss any of the charges or the complexities of a capital trial with appellant and made no inquiry into whether his waiver was knowing and voluntary. Judge Long failed to make a meaningful inquiry into appellant's understanding of elements of the offenses and possible defenses or provide an adequate explanation of the nature of capital trial proceedings, and ignored appellant's startling unexplained statement that he did *not* view self-representation as a disadvantage. As a result, the record does not affirmatively demonstrate a voluntary, knowing and intelligent waiver, and the judgment must be reversed in its entirety.

1. The December 20 hearing

The record of the hearing before Judge Ransom is limited to a few generic advisements that fall far short of what is required for a valid waiver of counsel in a capital case. Judge Ransom did not explore "the nature of the proceedings, potential defenses and potential punishments." (*People v. Koontz*, *supra*, 27 Cal.4th at p. 1071.) In addition to the murder charges with special circumstances, appellant was charged with 20 serious felonies including attempted murder, robbery, burglary, and numerous sentencing enhancements. (1 CT 194-205.) Judge Ransom did not explain the elements of the murder charges or any of the other charges, or explain the possible defense or the possible punishments, other than to confirm that appellant faced the death penalty. Nor did Judge Ransom ask appellant if

he knew what charges he faced or make any other inquiry into appellant's understanding of the offenses. Although appellant's counsel were present at this hearing (1 RTS 12), Judge Ransom did not ask them whether they had discussed the elements of the offenses and possible defenses with appellant.

The assistance which counsel can provide turns on the nature of the proceeding. (*Patterson v. Illinois, supra,* 487 U.S. at pp. 299-300.) At the December 20 hearing, Judge Ransom knew that the case had been set for trial, but he did not advise appellant about the bifurcated nature of a capital trial, or the unique nature of a penalty trial, or discuss or explain the concepts of aggravation or mitigation. Judge Ransom did not ask any questions about appellant's legal experience and had no basis on which to conclude that appellant had any understanding of the complexities of a capital trial.

Although a written waiver of rights may provide assurance that a waiver of counsel is knowing and intelligent (*People v. Blair, supra,* 36 Cal.4th at p. 710), the waiver in this case adds nothing to the oral record. Judge Ransom's colloquy was an almost verbatim reading of the warnings contained in the written form. (1 RTS 13-16; 1 CT 186.) In contrast to *Blair,* the one-page waiver form did not ask appellant about the nature of the charges and possible defenses, did not ask appellant to explain his legal experience, if any, and did not address the questions of competence or absence of coercion. (See footnote 14, *supra,* at page 26.)

The waiver before Judge Ransom was invalid for additional reasons. Judge Ransom made no inquiry at all into the other essential components of a valid waiver of counsel: whether appellant was "competent" to waive the right, i.e., "has the mental capacity to understand the nature and object of

the proceedings against him or her," and whether the waiver was voluntary, i.e., made "without coercion." *(People v. Koontz, supra,* 27 Cal.4th at p. 1070.) The entire colloquy consumed only three pages. (1 RTS 13-16.)

It may be that Judge Ransom believed that a cursory inquiry was sufficient because appellant seemed determined to waive counsel in order to overcome the effect of his counsel's refusal to consent to a guilty plea. But "[a] course of conduct that outwardly implies an intent to waive will nevertheless be held insufficient unless it appears that such a waiver was intelligently and understandingly made." (*In re Johnson* (1965) 62 Cal.2d 325, 334.) Rather than justifying an inadequate inquiry, appellant's position required the court to make greater efforts to ensure that appellant's waiver of counsel was not just a short-sighted response to his conflict with counsel about pleading guilty, but was based on an adequate understanding of what waiver entailed in the context of this particular case.

In *People v. Marshall* (1997) 15 Cal.4th 1, 23, this Court held that "in order to protect the fundamental right to counsel, one of the trial court's tasks when confronted with a motion for self-representation is to determine whether the defendant *truly desires* to represent himself or herself." (Emphasis added.) To this end, the court

> should evaluate not only whether defendant has stated the motion clearly, but also the defendant's conduct and other words. Because the court should draw any reasonable inference against waiver of the right to counsel, the defendant's conduct or words reflecting ambivalence about self-representation may support the trial court's decision to deny the defendant's motion.

(*Ibid.*) Given the conflict between counsel and appellant about pleading guilty, the court should have made a further inquiry to determine if

appellant "truly desire[d]" to represent himself. Judge Ransom knew that at his arraignment, appellant had asked to address him in private in response to the court's question about appointing counsel. (1 RTS 11.) Although this request suggested that appellant had concerns about his appointed counsel, the court denied the request. Judge Ransom was also aware that appellant wished to plead guilty but that his counsel did not consent, that appellant's request to represent himself was made after his counsel refused to consent and that it was coupled with another request to plead guilty. (1 CT 180.) It should therefore have been apparent to the court that appellant's probable reason for waiving counsel was not an unequivocal desire to represent himself but an attempt to get around Section 1018's limit on his ability to plead guilty. If this was confirmed by appellant or his appointed counsel (who were present in court and available to respond to inquiries),[18] Judge Ransom could then have deferred ruling on appellant's motion and conducted an inquiry to determine if there was an available alternative to waiving counsel in a capital case, such as the appointment of

---

[18] If requested by the court, counsel could have provided "relevant and non-privileged information" pertinent to appellant's request to proceed pro se. (*People v.Kirkpatrick* (1994) 7 Cal.4th 988, 1010 [while counsel should refrain from formally opposing a client's *Faretta* motion, "counsel can assist the court and serve the client's best interests by advising the client of the risks and disadvantages of self-representation; by providing the trial court, upon request, with relevant non-privileged information and legal authority; and by correcting any misstatement of facts by the client"].) If privileged information was relevant, the court could have excused the prosecutor, who had no stake in the motion, and held an in camera inquiry. Absent such an inquiry, the record does not reflect the extent to which appellant and his assigned counsel had attempted to resolve their conflict or whether the interests protected by Section 1018 and the Sixth Amendment right to counsel would be better served in this capital case by the appointment of new counsel.

different counsel or the appointment of independent counsel to advise appellant about ways to accommodate his apparent desire to acknowledge responsibility for his actions without sacrificing the assistance of counsel who would ensure that the degree of his legal culpability, which turned on his state of mind, was reliably determined.

For all these reasons, the record of Judge Ransom's cursory inquiry and advisements does not show a knowing, intelligent and voluntary waiver of the right to counsel.

2. Hearing on January 5

The record of the hearing before Judge Long on January 5, 2001, does not cure the inadequacy of Judge Ransom's advisements, and raises further questions about the validity of appellant's waiver. Judge Long initially arraigned appellant on the amended Information filed that day, reading each charge in the statutory language used in the amended Information. In that context, appellant answered "yes" to Judge Long's questions whether he understood the charges. (1 RTS 19-34.) But in light of the complexity of the charges, that was insufficient to assure that appellant actually understood what the state was required to prove and the possible defenses. As this Court has observed, "[t]he elements of murder and manslaughter, the distinctions between first and second degree murder and the principles governing defenses to charges of such crimes are often difficult even for experienced judges and skilled practitioners to apply." (*Ex parte James* (1952) 38 Cal.2d 302.)

With respect to the first and second degree murder charges, appellant was told only that he was charged with acting "with malice aforethought." (1 RTS 25, 31.) The court never defined "malice aforethought" or

explained the difference between express and implied malice.[19] The court did not explain the first and second degree felony murder rules on which the prosecutor and the court relied in finding appellant guilty of counts 12 and 21. (1 RTS 86, 312. 2 RTS 294-295, 298-299)[20] Nor did the court define attempted murder [21] or explain the elements of premeditation and deliberation alleged in connection with Count 22.[22] Finally, Judge Long did not discuss the possible defenses to murder or the lesser included offenses within the charged offenses. While appellant's prior legal

---

[19] "Malice aforethought" is defined in CALJIC 8.11 as follows: "'Malice' may be either express or implied. [¶] Malice is express when there is manifested an intention to kill a human being. [¶] Malice is implied when: [¶]1. The killing resulted from an intentional act; [¶] 2. The natural consequences of the act are dangerous to human life; and [¶] 3. The act was deliberately performed with knowledge of the danger to, and conscious disregard for, human life. [¶]When it is shown that a killing resulted from the intentional doing of an act with express or implied malice, no other mental state needs to be shown to establish the mental state of malice aforethought. [¶] The mental state constituting malice aforethought does not necessarily require any ill will or hatred of the person killed. [¶] The word 'aforethought' does not imply deliberation or the lapse of considerable time. It only means that the required mental state must precede rather than follow the act." (California Jury Instructions, Criminal (6th ed. 1996).)

[20] The court found appellant guilty of the second degree murder of Ms. McCoy on two theories: first, that it was an unlawful killing that occurred during the commission of a violation Vehicle Code section 2800.3, and on the basis of a finding of implied malice as defined in CALJIC No. 8.32. (2 RTS 312.)

[21] The mental state required for attempted second degree murder is "a specific intent to unlawfully kill another human being." (CALJIC 8.66, "Attempted Murder.")

[22] See CALJIC No. 8.67, "Attempted Murder-Willful, Deliberate and Premeditated."

experience may have been relevant to his understanding of the charges and Judge Long stated he did not know what appellant's experience was, he made no inquiry into that area, even after indicating that he intended to do so. (1 RTS 35.) Therefore, in the context of the charges in this case, appellant's affirmative answers to the court's questions whether he "understood the nature" of the charges that required proof of "malice aforethought" does not demonstrate that he comprehended the nature of the charges or possible defenses.

It is true that Judge Long asked appellant "if you wished to present a defense, that is kind of up to you, but if you wish to do that, your mind is clear and your thoughts and you understand the charges where if you wish to do that, you feel you could do that?" and appellant responded "Yes, I do." (1 RTS 42.) The focus of this question was not whether appellant's waiver was knowing and voluntary, but on the separate question of whether he was competent to waive counsel and represent himself, i.e., whether his "mind is clear and his thoughts" and whether he "could," i.e., had the ability to, present a defense.

The scant record does not establish why appellant wanted to waive counsel. If it was because his counsel refused to permit him to plead guilty, then a comprehension of what the prosecutor would be required to prove to convict him of capital murder, and an understanding of possible defenses and the existence of lesser included offenses, would likely have affected appellant's decision. If appellant's goal was to accept responsibility for his actions, the possibility of a conviction of something less than capital murder would have allowed him to do so without having to plead guilty to the capital offenses. This may have removed the basis of his conflict with counsel, and made it unnecessary to waive counsel's assistance.

With respect to appellant's understanding of the penalty trial, Judge Long did provide some information beyond that discussed by Judge Ransom. He told appellant that if he was convicted of capital murder, he could be sentenced to death if there was a finding that aggravation outweighed mitigation. (1 RTS 34-35.) But he did not define those terms or provide any examples from Section 190.3. As a result, there is no showing that appellant understood what the assistance of counsel would mean at the penalty phase.

Moreover, Judge Long did not follow up on appellant's startling statement that he did not believe self-representation was a disadvantage, which was made in the following context:

> [THE COURT]: You understand that these are very, very serious matters and that whatever your legal training is and I don't know what it is, I am going to get into that, that you sir are placing yourself at a severe disadvantage? Do you understand that?
>
> MR. DANIELS: Yes, your Honor. I don't look at it as a disadvantage.
>
> THE COURT: You do not look at it as a disadvantage?
>
> MR. DANIELS: No.
>
> THE COURT: All right.

(1 RTS 35.) The court made no further inquiry and moved on to another topic.

Coming after appellant had been warned about the disadvantages of self-representation by both Judge Ransom and Judge Long, this statement was remarkable. On its face, it meant that despite what he had been told, appellant did not really understand the disadvantages of self-representation.

The court therefore had a duty to clarify appellant's statement and take appropriate action to ensure that appellant did understand before proceeding with the waiver. Appellant's statement also raised a question about whether he had an undisclosed belief that affected his assessment of the risks of self-representation. Before accepting appellant's waiver, the court should have asked appellant why he did not view self-representation as a disadvantage. If appellant's answer revealed that he believed that self-representation carried some undisclosed benefit, then his waiver of counsel would not be knowing and voluntary. Similarly, if the answer disclosed that his view was based on a misunderstanding, then his waiver would not be knowing and intelligent unless the court corrected his mistake. (*People v. Carter* (1967) 66 Cal.2d 666, 671 [waiver of counsel based on defendant's mistaken belief that he would be permitted meaningful access to and use of law library, "reinforced by the failure of the trial judge to promptly and unequivocally" correct that belief, was invalid].)

If it were permissible to speculate about what appellant meant, which it is not, it might be argued that appellant could have meant that he was not at a disadvantage because by waiving counsel, he could effectively plead guilty, in violation of Penal Code section 1018. (See Argument III, *infra.)* However, nothing in the record indicates that the court was then aware that appellant would stand mute at his subsequent court trial, and thus the court was not in a position to interpret appellant's statement in that way. In sum, the record of the hearings on appellant's waiver of counsel does not affirmatively show a knowing, intelligent and voluntary waiver of counsel.

Nothing in the record of the proceedings following appellant's waiver affects the conclusion that the waiver was invalid. Appellant's lack of participation in his subsequent court trial is consistent with a lack of

comprehension about the nature of the offenses and the proceedings. Although Judge Long offered to appoint counsel at the beginning of the prosecution's guilt phase presentation and at the beginning of the penalty phase (1 RTS 77; 2 RTS 316-317), he did so without ever explaining or exploring appellant's understanding of the nature of the offenses or possible defenses, and without ascertaining what appellant meant when he said he did not view self-representation "as a disadvantage."

D. The Invalid Waiver of Counsel Requires Reversal

In *People v. Burgener, supra,* 46 Cal.4th at p. 244, this Court noted that the Supreme Court has not yet determined whether a defective *Faretta* warning is subject to harmless error analysis, but that, "[w]ith one exception, every federal circuit to have considered the issue has concluded that 'harmless error analysis is inapplicable to failure-to-warn *Faretta* violations.' [Citations omitted.]" Because the defendant in *Burgener* was entitled to relief under *Chapman's* harmless-beyond-a-reasonable doubt standard (*Chapman v. California* (1967) 386 U.S. 18, 24), the Court found it unnecessary to determine what standard of prejudice, if any, should apply.

Appellant submits that this Court should follow the near-unanimous opinion of the federal courts that harmless error analysis is inapplicable. The trial court's failure adequately to warn appellant about the nature of the right to counsel and the disadvantages of self-representation resulted in a capital trial and verdict without any participation by the defense. The premise of *Chapman's* harmless error is that "certain constitutional errors, no less than other errors, may have been harmless in terms of their effect on the fact finding process at trial. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681.) Because appellant's self-representation resulted in no meaningful inquiry into the evidence presented by the prosecution, that

premise is absent here. As the Supreme Court has recognized, "some errors necessarily render a trial fundamentally unfair" and the denial of the right to counsel is one such error. (*Rose v. Clark* (1986) 478 U.S. 570, 577, citing *Gideon v. Wainwright* (1963) 372 U.S. 335; *Penson v. Ohio* (1988) 488 U.S. 75, 88 [denial of counsel on appeal presumptively prejudicial]; *United States v. Cronic* (1984) 466 U.S. 648, 659 [holding that "a trial is unfair if the accused is denied counsel at a critical stage of his trial"]; *Chapman v. California* (1967) 386 U.S. 18, 23 [recognizing that the right to counsel is "so basic to a fair trial that [its] infraction can never be treated as harmless error"]; see also *Cordova v. Baca* (9th Cir. 2003) 346 F.3d 924, 930 [holding "that if a criminal defendant is put on trial without counsel, and his right to counsel has not been effectively waived, he is entitled to an automatic reversal of the conviction"].)

E. Conclusion

Under the compulsion of *Faretta*, reversal of the death judgment is required, because the record does not reflect that appellant understood the disadvantages of self-representation, including the risks and complexities of the particular case. Under these circumstances, appellant did not voluntarily, knowingly, and intelligently waive his Sixth Amendment right to counsel. Consequently, appellant's right to counsel, due process of law, and a reliable penalty determination as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, were all violated by the trial court's error, requiring reversal of the judgment in its entirety. (*Faretta v. California*, *supra*, 422 U.S. at p. 835; *In re Smiley* (1967) 66 Cal.2d 606, 624-625.)

II.

APPELLANT'S WAIVER OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A JURY TRIAL ON THE MURDER AND RELATED CHARGES, SPECIAL CIRCUMSTANCES AND PENALTY WAS NOT A KNOWING AND INTELLIGENT WAIVER

A. Introduction

The Sixth Amendment, made applicable to the states by the Fourteenth Amendment, grants criminal defendants the due process right to be tried by a jury. (*People v. Collins* (2001) 26 Cal.4th 297, 304, citing *Duncan v. Louisiana* (1968) 391 U.S. 145, 148-150.) Under Article 1, section 13 of the California Constitution, "[t]rial by jury is an inviolate right . . . [which] may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and defendant's counsel." Article 1, section 13 also mandates a jury of 12 persons in cases in which a felony is charged. Thus, the right to a jury trial is a fundamental constitutional right under both the state and federal Constitutions.[23] (*People*

---

[23] As the United States Supreme Court explained in a unanimous opinion:

> "The right to have a jury make the ultimate determination of guilt has an impressive pedigree. Blackstone described 'trial by jury' as requiring that *'the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors....' 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) (emphasis added). Justice Story wrote that the 'trial by jury' guaranteed by the Constitution was 'generally understood to mean ... a trial by a jury of twelve men, impartially selected, who must unanimously

v. Collins, supra, 26 Cal.4th at p. 304, citing *Sullivan v. Louisiana* (1993) 508 U.S. 275, 281-282; *People v. Ernst* (1994) 8 Cal.4th 441, 444-445.)

A waiver of the right to a jury trial under both the federal and state constitutions requires an express and personal waiver by the defendant. (*People v. Collins, supra,* 26 Cal.4th at pp. 304-305 & fn. 2 [express waiver in open court required under both state and federal law]; Calif. Const., art. 1, § 16; *Patton v. United States* (1930) 281 U.S. 276, 308-312 [express personal waiver required under federal Constitution]; see also Fed. Rules of Crim. Proc. Rule 23 [express, written waiver required under federal rules].) A waiver of the right to a jury trial must also be voluntary, knowing, and intelligent, "'made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it.'" (*People v. Collins, supra*, 26 Cal.4th at p. 305, citing *Colorado v. Spring* (1987) 479 U.S. 564, 573; *McCarthy v. United States* (1969) 394 U.S. 459, 465-466; *Johnson v. Zerbst* (1938) 304 U.S. 458, 464; *Patton v. United States*, *supra*, 281 U.S. 276, 308-312.)

> *concur in the guilt of the accused before a legal conviction can be had.*' 2 J. Story, Commentaries on the Constitution of the United States 541, n. 2 (4th ed. 1873) (emphasis added and deleted). This right was designed 'to guard against a spirit of oppression and tyranny on the part of rulers,' and 'was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties.' *Id.*, at 540-541. See also *Duncan v. Louisiana*, 391 U.S. 145, 151-154, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) (tracing the history of trial by jury)." (*United States v. Gaudin* (1995) 515 U.S. 506, 510-511, fn. omitted, cited in *People v. Hovarter* (2008) 44 Cal.4th 983, 1026, fn.18.)

The nature of a jury trial in felony cases in California includes three essential elements, not subject to legislative or judicial curtailment: 1) the number of jurors (twelve), 2) impartiality of the jurors, and 3) unanimity of the verdict. (Calif. Const. Art. 1, § 16; *People v. Howard* (1930) 211 Cal. 322, 324.)

> "Among the essential elements of the [California constitutional] right to trial by jury are the requirements that a jury in a felony prosecution consist of 12 persons and that its verdict be unanimous. [Citations.] [¶] ... The elements of number and unanimity combine to form an essential element of unity in the verdict. By this we mean that a defendant may not be convicted except by 12 jurors who have heard all the evidence and argument and who together have deliberated to unanimity."

People v. Traugott (2010) 184 Cal.App.4th 492, 500, citing *People v. Collins, supra*, 17 Cal.3d at p. 693.)

A defendant charged with a special circumstance also has a fundamental Sixth Amendment right to have a jury determine the truth of that special circumstance. (*People v. Lewis* (2008) 43 Cal. 4th 415, 520-521.) As this court explained in *Lewis*, because the special circumstance finding is the functional equivalent of an element of the crime of capital murder, the Sixth Amendment requires that it must be found true by a jury beyond a reasonable doubt. (*Id.* at pp. 520-521, citing *Aprendi v. New Jersey* (2000) 530 U.S. 466; *Cunningham v. California* (2007) 549 U.S. 270; *Ring v. Arizona* (2002) 536 U.S. 584.)

In California, the consequences of non-unanimity on the issue of guilt or the truth of special circumstances are similar. Should the twelve jurors not reach unanimity at the guilt phase, the court declares a mistrial and the defendant has the right to be tried again by a separate jury. (Pen. Code, §§1140, 1141.). Should the twelve jurors not unanimously agree on

the truth of one or more special circumstances, a second jury would be impaneled to determine the truth of the special circumstances charged. (Pen. Code, §190.4, subd. (a).) Should that second jury also fail to reach unanimity, the trial court would have discretion to impanel another jury or to sentence a defendant to a fixed term of 25 years. (*Ibid.*)

In the present case, appellant, who represented himself, waived his right to a jury trial as to his guilt and the truth of the charged special circumstances. However, his waiver was neither knowing nor intelligent, as appellant was never informed of or waived the "essential element of unity in the verdict" (*People v. Traugott, supra,* 184 Cal.App.4th at p. 500) – that a jury in a felony case consists of 12 persons whose verdict must be unanimous, or informed of the consequences of his waiver. Accordingly, appellant's waiver of his right to a jury trial was invalid. Because the right to have a jury determination of guilt and special circumstances is a fundamental constitutional right, the denial of these rights to appellant was structural error, requiring reversal.

Appellant also waived his right to a jury trial on whether the death penalty should be imposed. That waiver too was invalid and independently requires that the death judgment imposed buy the court be set aside.

B. Appellant's Waiver of His Constitutional and Statutory Rights to a Jury Trial on the Murder Charges, Special Circumstances and the Related Felonies Was Not a Knowing and Intelligent Waiver Because It Was Not Made With a Full Awareness of the Nature of the Right Being Relinquished

After the trial court accepted appellant's waiver of his right to counsel (1 RTS 34-42), the following exchange occurred:

The Court: The other question I think I might raise with you is do you intend to proceed in terms of the guilt phase, and if

there is a penalty phase, by way of jury trial or by way of court trial?

Mr. Daniels: Court trial.

The Court: Are you satisfied that that's what you want to do?

Mr. Daniels: Yes.

The Court: Do you understand that you have an absolute right to proceed by way of jury trial both in the guilt phase and at the penalty phase, if there is a penalty phase, if you want to do that? Do you understand me?

Mr. Daniels: Yes.

The Court: What you are telling me then is that you wish to waive your right to jury trial in the guilt phase and in the penalty phase which basically means if there is two phases, you will not have a jury determine your fate, but rather the Court will make certain findings based upon what you have been charged with? Do you understand that?

Mr. Daniels: I understand.

The Court: And more specifically in the posture that we are presently in, that I will be the Judge that will make those determinations. Do you understand that?

Mr. Daniels: I understand.

The Court: Do you understand that if you go by way of court trial rather than jury trial, I will decide whether the prosecution has proven its case beyond a reasonable doubt in the guilt phase of the trial, it will be my job to determine whether you are guilty or not guilty of the charges and allegations made against you? Do you understand that?

Mr. Daniels: I understand.

The Court: Do you understand that I will determine whether the special circumstances are true or not true? Do you understand that?

Mr. Daniels: Yes.

The Court: Do you understand if I find you guilty of murder, of special circumstances, in the guilt phase of the trial, I will also determine whether the punishment is life without the possibility of parole or the death penalty in the penalty phase of the trial? You understand that?

Mr. Daniels: Yes, I understand.

The Court: Have you understood everything that I have told you relative to your right to proceed by way of jury trial or by way of court trial?

Mr. Daniels: Yes.

Mr. Curry: If I could just interject one thing. You did touch on it, but he would also have the right to have the jury determine the truth or not truth of the special circumstances. I think you did mention that.

The Court: Yes. If you waived the jury, then the jury will not determine the truth and validity of the special circumstances, that will be my job to determine whether they are true or not true. Do you understand that?

Mr. Daniels: I understand.

The Court: Now, in terms of waiving your right to jury trial in both the guilt and if there is a penalty phase, that phase also, are you doing this of your own free will?

Mr. Daniels: Yes.

The Court: Have any threats been made against you or any member of you family to get you to waive your right to a jury trial?

Mr. Daniels: No.

The Court: Have you been subject to any force to get you to waive your right to a jury trial?

Mr. Daniels: No.

The Court: Is there some consideration of secret promise or deal or something that I am not aware of that's making you or forcing you to waive your right to jury trial and proceed by way of court trial?

Mr. Daniels: No.

The Court: Are you presently under the influence of any substance that would cause you not to be able to think clearly?

Mr. Daniels: No.

The Court: Do you know what you are doing?

Mr. Daniels: Yes.

The Court: All right. Do the People join, also?

Mr. Curry: Yes.

The Court: Also in the waiver of jury trial rights as to the guilt phase and also if there is a penalty phase, that the People waive their right to a jury trial in the penalty phase?

Mr. Curry: Yes, People join.

The Court: All right. Do you know what you have just done, sir?

Mr. Daniels: Yes.

The Court: All right. The Court finds that Mr. Daniels understands and freely and voluntarily waives his right to jury trial and has elected to proceed by way of court trial in the guilt phase and also by way of court trial in the penalty phase if, in fact, there is a penalty phase. And these waivers are now made part of the records of this Court.

(1 RTS 43-46.)

"The burden is on the party claiming the existence of the waiver to prove it by evidence that does not leave the matter to speculation, and doubtful cases will be resolved against a waiver." (*People v. Smith* (2003) 110 Cal.App.4th 492, 500-501.) In the present case, the record does not reflect a knowing and intelligent waiver. The colloquy that the trial court conducted did not mention any of the essential elements of a jury trial; appellant was never told that a jury consisted of twelve members who must unanimously agree in order to reach a verdict as to guilt and the truth of the special circumstances. Nor was appellant advised about the consequences of non-unanimity. While the court asked appellant if he understood that he was waiving a jury, appellant said nothing to suggest that he did, in fact, understand that in order to be convicted, a jury of 12 persons would be required to reach a unanimous agreement. Because the trial court did not inform appellant of the nature of the right he was waiving, it would be pure speculation to conclude that appellant's waiver was knowing and intelligent.

Even where a defendant is represented by counsel, the record must "reflect[] an express and personal understanding and waiver of [the] right to jury trial." (*People v. Wrest* (1992) 3 Cal.4th 1088, 1104-1105.) It is

ultimately the responsibility of the court, not counsel, to ensure that the waiver is knowing and intelligent. In *Wrest*, this Court upheld the defendant's waiver of his right to a jury trial because a "complete description of the essential elements of jury trial [were] conveyed to appellant as well as affirmation of his express understanding of those elements." (*Id.* at p. 1105.) The on-the-record colloquy between the prosecutor and Wrest included the following:

> [The Prosecutor]: You understand you have a right to a trial by jury, which means that 12 citizens selected by your lawyer and by myself would hear all the facts of this case and decide whether or not you were guilty of the charges, the enhancements, the special allegations, or any other special allegations that are charged in this particular case? Do you understand that?
>
> The Defendant: Yes.
>
> [The Prosecutor]: All 12 citizens would have to agree that you were guilty in order to be convicted of any charge against you. And all 12 citizens would have to agree that you are not guilty in order to acquit you. And all twelve would have to agree of [sic] any enhancements, prior prison terms, any serious allegations, or the special circumstances. Do you understand that?
>
> The Defendant: Yes.
>
> [The Prosecutor]: By initialing that box [indicating the jury waiver box on the waiver form] you're indicating that you did hereby waive and give up your right as to the charges we've discussed earlier, any enhancements and special allegations that we've already talked about; is that right?
>
> The Defendant: Yes.

> [The Prosecutor]: In other words, you don't want a jury trial on the issue of guilt or the special circumstances or the enhancements, right?
>
> The Defendant: Right.
>
> [The Prosecutor]: And you've discussed that with your lawyer, Mr. Cannon?
>
> The defendant: Yes.

(*Id.* at p. 1104; italics omitted; emphasis added.)

In *People v. Robertson* (1989) 48 Cal.3d 18, defendant argued that his waiver of a jury for his penalty retrial was invalid because the court did not advise him about the unique hung jury provision of the 1977 law.[24] In rejecting the argument, the Court presumed, in the absence of contrary evidence in the record, that Robertson's two attorneys, "who over the course of several days discussed with him 'at length' the consequences and nature of his proposed action . . . informed him of the effect of a jury waiver." (*Id.* at p. 36.) In addition, the Court relied upon the extensive, multi-part colloquy conducted by the trial court, which explained the procedures of the retrial, the defendant's rights, the possible outcomes of the trial, the role of the court, and inquired whether any promises or threats induced the defendant to waive his right to a jury. (*Id.* at p. 38 and fn. 5.) This colloquy included an explanation of the essential elements of a jury trial. "You understand, also, that if you do waive jury and submit it to the

---

[24] Under former Penal Code section 190.4, subdivision (b), if the trier of fact was a jury and was unable to reach a unanimous verdict, the court was required to dismiss the jury and impose a sentence of life without possibility of parole. (*People v. Roberston, supra,* 48 Cal.3d at p. 35.)

Court, the Court will act solely. *If you have a jury trial, before a verdict can be returned either way, it requires unanimous agreement of all 12 jurors*; do you understand that? (*Roberston, supra*, 48 Cal.3d at p. 36; emphasis in original.) In accord, *People v. Tijerina* (1969) 1 Cal.3d 41, 45-46 and fn. 2 (waiver valid where defendant stated that he knew what a jury trial was, and was also told by the prosecutor, "That is when twelve people sit over here in the box and hear all the evidence.")

In contrast, appellant said nothing to indicate his awareness of the right to have a jury of 12 members of the community reach a unanimous decision. It is true that the prosecutor filed a memorandum requesting that the court conduct a supplemental colloquy regarding the rights appellant was waiving. (1 CTS 255-257.) A proposed question in this memorandum asked, "You have an absolute right to have your case heard by a jury of twelve persons. Do you understand this?" (1 CTS 256.) But the trial court did not ask this question, and the record does not establish that appellant received or reviewed this memorandum. Although the first page of the memorandum lists appellant as an intended recipient, there is no proof of service or notation on the document indicating that appellant received this memo. In contrast to the document regarding the possible sentences for the non-capital crimes to which appellant pled guilty, which was discussed on the record in appellant's presence (1 RTS 55), there is no mention of the January 3, 2001 document. Unlike the Notice of Evidence in Aggravation, which was also discussed on the record (1 RTS 62) and bears a notation, "Hand delivered to Daniels 1/3/01" and appellant's circled initials (1 CTS 258-259), the memorandum contains no evidence that it was in fact served on appellant.

But even if it could be argued that appellant was given this

memorandum, there is no indication on the record that he read it and understood that a jury consisted of twelve people. The court made no reference to the memorandum and did not ask appellant if he received, read and understood it. Moreover, there was nothing in the memorandum that informed appellant of the requirement of unanimity, nor did the court inform him of this or ask if he understood the unanimity requirement and the consequences of non-unanimity. The record is completely silent on this point.

Under California law, a knowing and intelligent waiver of the right to trial by jury may be found where the defendant is represented by counsel who discusses the consequences and nature of the proposed waiver with defendant, and where the court engages the defendant in an extensive and thorough voir dire expressly directed to determining whether the waiver was voluntary, knowing, and intelligent. (*People v. Robertson, supra,* 48 Cal.3d at pp. 37-38.) In *Robertson,* although defendant's counsel and the trial court did not explain to Robertson on the record the effect of a jury deadlock at the penalty phase, this Court "presume[d] that competent counsel would have informed defendant of the consequences of a jury deadlock." (*Id.* at p. 37.) Moreover, the court's substantial colloquy with the defendant assured this Court that the waiver was voluntary, knowing, and intelligent. (*Id.* at 37 and 38, fn. 5; see also *People v. Lookadoo* (1967) 66 Cal.2d 307, 311 [trial court and counsel went to great lengths to explain nature and consequences of jury trial waiver]; *People v. Castaneda* (1975) 52 Cal.App.3d 334, 344-345 [trial court not required to explain philosophical or tactical differences between court trial and jury trial when defendant represented by competent counsel]; *People v. Martin* (1980) 111 Cal.App.3d 973, 981 [defendant represented by counsel and court informed

defendant that right to jury trial included right to have 12 people hear case]; *People v. Tijerina, supra,* 1 Cal.3d at pp. 45-46 [when defendant represented by counsel at all stages of proceeding and is thoroughly questioned on the record before his waiver of a jury trial was accepted, trial court does not have to explain significance of non-unanimity].)

In the present case, of course, appellant had no such advisement by counsel, as he represented himself. Because a defendant's legal knowledge is not a prerequisite to proceeding pro se, the court made no inquiry at all into appellant's understanding of the law when it granted his request to represent himself. (See Argument I, *supra.*) Without an adequate on-the-record advisement regarding the nature of the jury trial right as well as the consequences of non-unanimity, as to either guilt or the special circumstances, there can be no presumption that appellant was so informed or understood the nature and consequences of the right he was waiving.

It is ultimately the responsibility of the court, and not of counsel or the defendant, to ensure that the record reflects that the waiver of a fundamental constitutional right is knowing and intelligent. (See, e.g., *Boykin v. Alabama* (1969) 395 U.S. 238, 244.) The Supreme Court instructs courts to "indulge every reasonable presumption *against waiver* of fundamental constitutional rights." (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464; emphasis added.) Here, the trial court failed in its duty to conduct an inquiry adequate to ensure that appellant's waiver of his right to a jury trial was knowing and intelligent.

C. The Denial of Appellant's Right to a Jury Trial Was Structural Error, Requiring Reversal of Appellant's Conviction of the Murders, Special Circumstances and Related Felonies Tried By the Court

Under both the federal and state Constitutions, the denial of the right to a jury trial is a structural error, compelling reversal without reference to prejudice to an appellant. (*People v. Collins*, *supra*, 26 Cal.4th at p. 311; *Sullivan v. Louisiana, supra*, 508 U.S. at pp. 281-282 ["The deprivation of that right with consequences that are neccessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error'"].) The denial of the state constitutional right to a jury trial is also reversible per se. As this Court explained in *People v. Ernst*, *supra*, 8 Cal.4th at p. 449: "It has long been established that the denial of the right to a jury trial constitutes a "'structural defect' in the judicial proceedings" that by its nature results in . . . a miscarriage of justice." *Ernst* was reaffirmed in *People v. Collins, supra*, 26 Cal.4th at p. 311, where the Court refused to impose a "harmless error" analysis to the denial of this fundamental constitutional right.

Denial of the Sixth Amendment jury trial right is also structural error. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 281-282.) Because special circumstances are elements of capital murder, the Sixth Amendment right to a jury trial applies to the special circumstance findings as well as appellant's convictions for murder and related felonies, and reversal of the murder convictions and special circumstances compels reversal of the penalty judgment as well.

Harmless error analysis is inapplicable for an additional reason. "[W]here a case improperly is tried to the court rather than to the jury, there is no opportunity meaningfully to assess the outcome that would have ensued in the absence of the error." (*People v. Collins, supra,* 26 Cal.4th at

p. 312.) Because appellant's waiver of his right to a jury trial was not knowing and intelligent, he was denied a fundamental constitutional right and this Court must reverse appellant's convictions for the murder and attempted robbery of LeWayne Carolina, the robbery and burglary of Ray Jedkins, the attempted murder of Tamarra Hillian (counts 12-16), the murder of LaTanya McCoy, the attempted murder of Steven Weinrich, and the violation of Vehicle Code section 2800.3 (counts 20-22), and the sentences imposed on those counts regardless of prejudice.

D. Appellant's Waiver of Jury for Penalty Phase Was Not a Knowing and Intelligent Waiver

In California, a criminal defendant has a statutory right to a jury trial at the penalty phase of a capital case.[25] (*People v. Hovarter* (2008) 44 Cal.4th 983, 1025-1026.) So strong is this statutory mandate in favor of a jury trial, that even if a capital defendant has waived a jury trial prior to the guilt phase, a jury at the penalty phase will be presumed. (*Ibid.*) Thus, an express waiver prior to the guilt phase of a trial is not sufficient to waive the right to a jury at the penalty phase. (*Id.* at pp. 1026-1027 ["[A]s an added protection for criminal defendants, a single jury trial waiver given early in the trial process is insufficient; a defendant must reaffirm his waiver for the penalty phase."].) Such a waiver must be knowing, intelligent, and voluntary. (*Ibid.*)

---

[25] In Argument VII, *infra*, appellant requests the Court to reconsider its holding that the Sixth Amendment right to a jury trial does not apply to the penalty phase. Appellant submits that the penalty phase jury waiver should be evaluated under the Sixth Amendment for the same reasons advanced in Argument VII, but in light of this Court's holding in *People v. Robertson, supra,* 48 Cal.3d at p. 36, appellant will focus only on the statutory right in this section.

Moreover, this Court has recognized that the statutory right to a jury creates a liberty interest that is protected by the Fourteenth Amendment. In *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346,

> the Supreme Court stated: 'Where' as in California-'a State has provided for the imposition of a criminal punishment in the discretion of the trial jury . . . [t]he defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion [citation], and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the state.'"

(*People v. Robertson, supra,* 48 Cal.3d at p. 37.)

In the present case, prior to the penalty phase, the trial court informed appellant that the penalty phase involved a determination as to whether appellant would receive a sentence of death or life without the possibility of parole. (2 RTS 315-316.) After the court inquired whether appellant wanted the court to appoint counsel for the penalty phase, the following exchange occurred:

> Court: Do you realize, although you have waived your right to a jury trial, that I would empanel a jury to try these questions in the penalty phase, you have that right, but heretofore you have waived that right, and said you wanted a court trial. Do you still feel that way?
>
> Daniels: I do.
>
> Court: All right.

(2 RTS 317.) The waiver of appellant's right to a jury determination of penalty was not a knowing and intelligent waiver for the same reasons that his earlier waiver of a jury at the guilt phase was invalid: appellant was never told of the nature of a jury trial – that a jury at penalty phase would be

comprised of twelve members who must unanimously agree that the circumstances in aggravation outweighed the circumstances in mitigation. Appellant was similarly never informed of the consequences of non-unanimity.

In *Robertson,* the Court rejected a similar argument but under dissimilar circumstances. Robertson was represented by two attorneys "who over the course of several days discussed with him 'at length' the consequences and nature of his proposed waiver." (*People v. Robertson, supra,* 48 Cal.3d at p. 37.) In addition, the court "engaged in an extensive and thorough voir dire" before accepting the waiver. (*Ibid.*) While the court "would have done better to explain the effect of a jury deadlock" (*id.* at pp. 37-38), this Court was willing to presume, in the absence of contrary evidence, that counsel explained the effect of a deadlock to their client. (*Id.* at p. 37.) Here, as appellant was still unrepresented by counsel, the presumption that he would have been so informed by competent counsel is inapplicable.

Moreover, the waiver of a penalty phase jury was also invalid as appellant was never informed that a direct consequence of his waiver would be the loss of the right to an independent trial court review of the penalty imposed by a jury. As noted in Argument V, *infra, S*ection 190.4, subdivision (e), provides that all capital defendants receive an independent review of the sentence imposed. This provision not only offers capital defendants statutory protection, its adoption into the California capital sentencing scheme is an important safeguard against the arbitrary and capricious (and therefore unconstitutional) imposition of the death penalty. (See *People v. Lewis, supra,* 33 Cal.4th at p. 226; *Pulley v. Harris* (1984) 465 U.S. 37, 51; *People v. Frierson* (1979) 25 Cal.3d 142, 179.) Appellant

was never informed of this protection, nor asked to waive it. As the denial of independent review was a direct consequence of a waiver of the right to jury trial at the penalty phase, the waiver was invalid.

Appellant recognizes that this Court rejected a similar argument in *People v. Robertson, supra,* 48 Cal.3d at p. 38. But because Robertson was represented by counsel, the Court could presume that his counsel had informed him of the "consequences and nature" of the penalty phase jury right. The same presumption cannot be made here.

E. The Death Judgment Must Be Reversed

Like the denial of the state constitutional jury trial right guaranteed by article 1, section 16, the improper denial of a jury determination of penalty is a structural defect that by its nature results in a miscarriage of justice, requiring reversal without a showing of prejudice. (See *People v. Ernst, supra,* 8 Cal.4th at p. 449.) Like the denial of that right at the guilt phase, harmless error analysis is inapplicable for an additional reason. "[W]here a case is improperly tried to the court rather than the jury, there is no opportunity meaningfully to assess the outcome that would have ensued in the absence of the error." (*People v Collins, supra,* 26 Cal.4th at p. 312.)

The death judgment must therefore be reversed.

III.

ALLOWING APPELLANT TO REPRESENT HIMSELF, WAIVE JURY TRIAL AND NOT CHALLENGE THE PROSECUTION'S EVIDENCE IN ANY WAY WAS TANTAMOUNT TO PLEADING GUILTY, IN VIOLATION OF PENAL CODE SECTION 1018 AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

A. Introduction

Before waiving counsel and a jury trial, appellant made clear to the court that he wanted to plead guilty to all charges. Early in the proceedings, at his second court appearance on April 28, 2000, appellant asked to speak with the judge but was told to speak through his lawyer. (1 RTL 20.) In response, appellant stated emphatically "I'm not agreeing with nothing that's going on. I'm not agreeing with nothing that's going on here – I'm not agreeing with nothing that's going on here." (1 RTL 20.) Then, on August 7, 2000, at a setting date for appellant's preliminary hearing, appellant told Judge Ransom that he wanted to plead guilty and the following exchange occurred:

> Appellant: Your Honor, I wish to – I wish not to plead not guilty at this stage; I wish to plead guilty.
>
> Ms. Repkow [appellant's counsel]: He doesn't mean that.
>
> Appellant: I know exactly what I'm saying. We discussed this already.
>
> Ms. Repkow: We have explained to Mr. Daniels the necessity of having a not guilty plea entered on the record so we can move the case forward for a preliminary hearing.
>
> The Court: Do you understand that, Mr. Daniels?
>
> Appellant: I understand exactly what she is saying. What I

am saying is that I am prepared to enter a plea of guilty.

The Court: What are the possible consequences of his plea?

Ms. Repkow: He is facing the death penalty because the way [sic] the prosecution has charged the case.

Mr. Manning: Pursuant to the Penal Code.

The Court: You are not allowed to do this without your lawyers agreeing on it, sir.

The court then entered a not guilty plea for appellant. (1 RTL 44-45.)

On August 23, 2000, in response to the court's request that appellant waive his right to a continuous preliminary hearing so that the court could start later the next day, appellant said that he was "willing to waive all my rights . . . and go no further in the matter." (1 RTL 377.) The next day, after appellant was held to answer, he again said he wanted to plead guilty:

The Court: And at this time, Mr. Daniels, do you reaffirm your not guilty plea and denials of the enhancements as to all the items in the Information?

[Appellant]: No, I do not. I wish to enter a guilty plea.

The Court: Well, I believe, Counsel, that in light of the seriousness of the offense, you wish on your client's behalf to enter not guilty pleas and denials?

Mr. Manning: That's correct.

The court then entered not guilty pleas and denials for appellant. (1 RTL 404-405.) One week later, in response to Judge Ransom's question at his arraignment whether he wanted counsel, appellant asked to address the court in private, but the court refused. (1 RTS 10-11.) Appellant refused to waive time, but the court permitted defense counsel to waive time on his

behalf, and the case was continued to January 16, 2001 for trial. (1 RTS 11-12.) No proceedings were scheduled for the interim.

In a letter dated December 7, 2000, appellant wrote to Judge Ransome:

> I am Respectfully Requesting that I be allowed to withdraw my "Not Guilty" Plea and enter a "Guilty Plea." I am also Requesting that I Be allowed to Represent myself, my feretta Rights. I fully understand that I am charged with the Capitol offense of Murder penal code Section 187 with the special circumstances.
>
> (1 CT 180.)

On December 20, 2000, Judge Ransom granted appellant's request to represent himself but advised appellant he could not "plead guilty to a death penalty case and get the death penalty," even if he represented himself. (1 RTS 12.) On January 5, 2001, the case was transferred to Judge Long. (1 RTS 17.) Despite Judge Ransom's admonishment, appellant again attempted to plead guilty to all charges in front of Judge Long. (1 RTS 48.) The court would not allow his guilty plea to the homicides and related counts (Counts 12 through 16, and 20 through 22), but did allow him to plead guilty "straight up" to all other counts, for which he ultimately received an indeterminate sentence of 441 years to life, to be served consecutive to a determinate term of 125 years. (1 RTS 50; 2 RTS 510-214.) Appellant agreed that the court could review the transcript of the preliminary hearing to determine if there was a factual basis for the guilty pleas, and could consider the facts underlying the robberies contained in the transcript at the guilt and penalty phases. (1 RTS 51, 60.)[26]

---

[26] At the penalty phase, the court relied upon the preliminary hearing transcript to find that appellant had committed numerous other offenses

Appellant then waived a jury trial and agreed to have Judge Long decide the issue of guilt and penalty. At the court trial that followed, the prosecution presented the testimony of 13 guilt phase witnesses and submitted 90 exhibits in less than two days. (1 CT 294-300.) This was possible because appellant did nothing. After waiving a jury, he did not ask a single question of any witness at either phase, did not raise any objections to the prosecution's evidence, did not present any witnesses or evidence and made no argument in his defense or in mitigation.

Under the unique circumstances of this case, although appellant did not technically plead guilty to the homicides and related felonies, his actions were tantamount to a guilty plea. By waiving counsel and his right to a jury trial on guilt and penalty, by not presenting any evidence or argument in his behalf or cross-examining any witness, after his efforts to plead guilty had been rejected because his counsel did not consent, appellant was allowed to do what Penal Code section 1018 prohibits for defendants charged with capital offenses – pleading guilty without the consent of counsel. To say that appellant did not plead guilty because the court and the district attorney 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.

---

involving the use or threat of force or violence. (2 RTS 465-466.)

B. Appellant's Actions Were Tantamount to Guilty Pleas to Capital Murder Without the Consent of Counsel in Violation of Penal Code Section 1018

1. In California, the trial court does not have the 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 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.[27]

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 as this Court has explained, 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. (*People v. Chadd* (1981) 28 Cal.3d 739, 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.*) The last sentence of section 1018 contains the Legislature's explicit intent that the statute "be liberally construed to effect these objects and to

---

[27] Section 1018 further provides: "No plea of guilty for 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."

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

Prior to the 1973 amendment, the statute precluded the entry of a guilty plea by a capital defendant who did not appear with counsel, in order "to protect defendants by assuring that such a serious step as a guilty plea is a fully informed and competent one, taken only after consideration with advice and counsel." (*People v. Vaughn* (1973) 9 Cal.3d 321, 327, citing *People v. Ballentine* (1952) 39 Cal.2d 193.) In *Ballentine*, the defendant waived counsel and pled guilty. This Court reversed the judgment, holding that

> [a]lthough a defendant has the right to defend himself in person in a criminal prosecution (Const., art. I, § 13), he is not guaranteed the right to plead guilty to a charge of a felony punishable with death. In that situation, 'such proceedings shall be had as are ... prescribed by law.' (Const., art. I, § 8.) The Legislature has deprived the court of the power to accept a guilty plea from a defendant charged with a felony punishable with death when he is not represented by counsel.

(*People v. Ballentine, supra,* 39 Cal.2d at p. 196.) The Court explained that Section 1018 does not prevent a defendant from waiving counsel and representing himself, but simply "prohibits the court from receiving a plea of guilty to a felony for which the maximum punishment is death made by a defendant not represented by counsel." (*Id.* at p. 195.) Therefore,

> [s]hould a defendant waive his right to counsel and refuse to answer the charge against him by an acceptable pleading, the court must enter a plea of not guilty for him (Pen. Code, § 1024.) The cause would then proceed to trial and the defendant might represent himself, subject to the requirement that his waiver of the right to counsel was made understandingly, competently, and voluntarily in the exercise of a free choice. (*Cf. In re James,* 38 Cal.2d 302, 313

[240 P.2d 596]; *People v. Chesser,* 29 Cal.2d 815, 822 [178 P.2d 761].)

(People v. Ballentine, supra, 52 Cal.2d at p. 195.) Although a self-represented defendant could not plead guilty under the pre-1973 version of Section 1018, nothing in the statutory language barred a defendant from pleading to a capital charge even though his counsel had expressly advised him against making such a plea. (*People v. Vaughn, supra,* 9 Cal.3d at pp. 327-328.) It was this "statutory gap" which led the Legislature to add the further requirement that counsel consent to a guilty plea. (*People v. Chadd, supra,* 28 Cal.3d at p. 749.)

This Court first addressed the 1973 amendment to Section 1018 in *People v. Chadd, supra.* The defendant in that case, who had previously attempted to commit suicide, wished to plead guilty to the capital offenses against the advice of his counsel. (*Chadd,* 28 Cal.3d at pp. 744-745.) The trial court allowed the plea, reasoning that since defendant was competent to act as his own attorney under the standards of *Faretta v. California* (1975) 422 U.S. 806, it could accept his guilty plea despite the refusal of his counsel to consent, and such a finding would be "tantamount to" relieving defense counsel and permitting defendant to actually represent himself. (*Ibid.*) The trial court thereupon questioned defendant, found him competent within the meaning of *Faretta*, and allowed him to plead guilty to all counts of the information and to admit all the charged enhancements and the special circumstance allegations. (*Ibid.*) At no time did defendant actually represent himself and throughout the proceedings defense counsel continued to act as defendant's counsel of record. (*Ibid.*)

This Court reversed defendant's conviction, as it was obtained in violation of section 1018. (*People v. 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 Court explained that 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, this court stated that the Attorney General's suggestion that section 1018 could be interpreted to read that a capital defendant could fire his attorney, represent himself, and plead guilty would "obliterate" section 1018's careful distinction between capital and non-capital defendants:

> [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; fn and citations omitted.) 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.'" (*Ibid.*) 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; *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 the Supreme Court's 1975 decision in *Faretta* did not affect the validity of Section 1018 or the holding of *People v. Ballentine, supra*: "that decision did not strip our Legislature of the authority to condition guilty pleas in capital cases on the consent of defense counsel." (*People v. 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 trial 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."]

More recently, in *People v. Alfaro* (2007) 41 Cal. 4th 1277, this Court again considered section 1018, although this time, it was the defendant who 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 remorse strategy 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.*) This court refused to overrule *Chadd*, beginning its discussion of *Chadd* by noting that section 1018 was one of several exceptions to the general rule recognizing a defendant's autonomy interest in a criminal case. (*Ibid.*) In declining to revisit and limit the rule of *Chadd,* 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." (*Id.* at p. 1300, citing *Chadd,* 28 Cal.3d at pp. 750, 753.)

California's right to condition a guilty plea in a capital case on the consent of counsel and to refuse to allow a pro per defendant to plead guilty is further supported by the Supreme Court's recent decision in *Indiana v. Edwards* (2008) 554 U.S. 164. The High Court held in *Edwards* that a state may insist on representation by counsel for those defendants who are competent to stand trial but who suffer from mental illness to the point where they are not competent to conduct trial proceedings by themselves, without violating the Sixth Amendment. Significantly, the Court stated that *Faretta* "itself and later cases have made clear that *the right of self-*

representation is not absolute." (*Id.* at p.171: emphasis added.) Limits on self-representation may be imposed in order to assure a fair trial resulting in a reliable verdict and sentence, and to assure the appearance of fairness. (*Id.* at pp. 176-177.) "[I]nsofar as [Edwards'] lack of capacity threatens an improper conviction or sentence, self representation in that exceptional context undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial." (*Ibid.*) For the same reasons, the decision of the California Legislature to require representation by and the consent of counsel before a capital defendant may plead guilty, grounded on 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. Alfrao, supra,* 41 Cal.4th at p. 1300), does not run afoul of the Sixth Amendment.

2. Appellant's actions and inaction in the trial court were tantamount to a guilty plea, in violation of Section 1018

In the face of his counsel's refusal to allow him to plead guilty, appellant waived counsel and asserted his right of self-representation. When, despite his waiver of counsel, the trial court still refused to allow him to plead guilty to the capital charges, he requested a court trial and then did nothing at all. He did not cross-examine the prosecution witnesses, did not raise any objections to their testimony, and did not present any witnesses or evidence or make any argument in defense or in mitigation. In short, the court trial was no more than a slow plea of guilty, in violation of Section 1018.

In *People v. Wright* (1987) 43 Cal.3d 487, the Court cited with approval the definition of a slow plea set forth in *People v. Tran* (1984) 152 Cal.App.3d 680, 683 fn. 2:

> 'It is 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 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 omitted.]

(*People v. Wright, supra*, 43 Cal.3d at p. 496.)[28] 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." (*Id.* 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. (*People v. Tran, supra,* 152 Cal.App.3d at pp. 682-683 [following victim's direct testimony, defendant waived jury, stipulated that disturbing the peace was a lesser included offense, and submitted question of guilt without cross-examining victim or offering any other evidence]; *People v. Huynh* (1991) 229 Cal.App.3d 1067, 1071 [court trial based on documents and defendant's testimony].)

Wright recognized that it may be difficult to determine whether a

---

[28] *Wright* was disapproved on other grounds in *People v. Howard* (1992) 1 Cal.4th 1132, 1175.

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 the case before it 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, and defendant presented evidence in support of his motions to suppress, and argued that he was not guilty of the most serious charges. (*Id.* at pp. 497-499; *People v. Sanchez* (1994) 12 Cal.4th 1, 29-30 [proceedings involving submission on the transcript of the preliminary hearing at which defense counsel had engaged in substantial cross-examination and presented witnesses, the presentation of additional witnesses by the prosecution, defense motions to strike testimony and for a judgment of acquittal, and an extensive argument that the prosecution had not proven Sanchez' guilt of murder or the special circumstances, were not a slow plea]; *People v. Robertson* (1989) 48 Cal.3d 18, 37, 40 [waiver of jury for penalty and submission of the testimony of specified witnesses on the transcripts of prior proceedings was not a slow

plea where the parties reserved the right to and did call several of the specified witnesses as well as additional witnesses, and defendant did not concede that death was the appropriate penalty but rather offered "a complete and skillful defense"].)

This case stands in sharp contrast. It was or should have been apparent to Judge Long that appellant's agreement to a court trial was intended as a slow plea. Appellant had attempted to plead guilty several times earlier in the proceedings and attempted to do so again before Judge Long. (1 RTS 48) Before appellant waived jury, the court had been informed by the prosecutor that appellant contemplated waiving jury.[29] (1 CT 255.) In agreeing to the court trial, appellant did not reserve the right to present witnesses or any other evidence, declined the court's offer to appoint an investigator or advisory counsel (1 RTS 47-78), and did not request time to prepare for the guilt trial, which was scheduled to begin on January 16, 2001, only 10 days away. (1 RTS 78.) The court knew that appellant did not have discovery or any other materials with him in court, and when the court inquired, appellant said he did not want to bring them (but assured the court he knew what he was doing). (1 RTS 62-63.) Appellant's actions made clear even before the court trial began what he intended to do.

At a minimum, faced with this information, the court should have inquired into appellant's intentions before commencing the trial to

---

[29] In a memorandum dated January 4 and filed with the court on January 5, 2001, the prosecutor requested the court to supplement the usual waivers "in the event that [appellant] elects to continue to represent himself, waive a jury trial and plead guilty to some of the charges." (1 CT 255.) This memo indicates that there were prior discussion about the procedures that would be followed in this case.

determine if he was attempting to effectively plead guilty. The court should also have inquired of the prosecutor about why he had agreed to a court trial. If, as the subsequent events disclosed, the parties had confirmed that the court trial was tantamount to a guilty plea to capital murder, the court could have averted error by refusing to accept the jury waiver. "The cause would then proceed to trial and the defendant might represent himself, subject to the requirement that his waiver of counsel was made understandingly, competently and voluntarily in the exercise of free choice and appointing counsel, as required by section 1018." (*People v. Ballentine, supra,* 39 Cal.2d at p. 195.) Alternatively, the court could have reappointed counsel to consult with and advise appellant about how to proceed.

Any remaining doubt that appellant's intent was to plead guilty is dispelled by his lack of participation in the court trial. Appellant did not contest the facts or law in any way. Although the prosecutor presented the testimony of witnesses, appellant did not ask them any questions. Nor did he present any witnesses, any evidence or any argument. Once the prosecutor had concluded his case with no questioning by appellant and appellant confirmed that he did not intend to present any evidence, the results of the court trial were a foregone conclusion. Surely at that point the court had to be aware that appellant was effectively pleading guilty to the capital charges, in violation of section 1018. Rather than allowing the case to be submitted for decision, the court should have appointed counsel for appellant and continued the proceedings until counsel could consult with appellant and determine how to proceed. Because this was a court trial, a continuance would not have been impractical.

The fact that the proceeding was denominated a court trial by the

parties and that the prosecution presented live testimony does not change what actually occurred. As this Court recognized in *Wright*, "it is not enough to merely count the number of witnesses who testified at the hearing following 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." (*Ibid.*) Unlike the defendant in *Wright*, appellant did not reserve the right to present, or in fact present, any evidence or argument contesting the prosecution's facts or the legal sufficiency of those facts. Thus, the court trial in this case was no more than a slow plea.

It is true that appellant did not technically plead guilty, but the strong constitutional and policy interests reflected in Section 1018 were not served by the truncated, non-adversarial proceedings in this case. As previously noted, the 1973 amendment to section 1018 was part of an extensive revision of California's death penalty law meant to satisfy the Eighth Amendment and avoid the 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.) It reflects the state's "strong interest in reducing the risk of mistaken judgments" (*Id.* at pp. 751), an interest that is reflected in California's entire death penalty scheme, from the appointment of counsel through appeal. (*Id.* at pp. 751-752, citing *People v. Stanworth* (19) 71 Cal2d 820, 833.) The statute furthers the interests of reliability and reduces the risk of mistaken 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 . . . simply

wants the state to help him commit suicide." (*Chadd, supra,* 28 Cal.3d at p. 753.)

Moreover, interfering with appellant's choice would not have "implicated a[ny] constitutionally protected fundamental interest that might override the plain terms of section 1018." (*People v. Alfaro, supra,* 41 Cal.4th at p. 1302.) In *Alfaro,* this Court rejected appellant's argument that the trial court erred in refusing to remove or substitute counsel to allow defendant to plead guilty, reasoning 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 section1018" (*ibid.*) or, it follows, the state's independent interest in the reliability of its death judgments that Section 1018 is designed to serve. Thus, this Court has recognized that although a defendant has the right to control fundamental aspects of the defense or to the assistance of counsel to present the defense, he enjoys no concomitant right to present no defense that will override the state's independent interest in the reliability of its death judgments.

As in *Alfaro*, 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. 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 was nothing more than a slow plea of guilt to the capital charges.

C. A Capital Conviction Obtained in Violation of Section 1018 Must Be Reversed

A capital conviction obtained in violation of section 1018 must be reversed without reference to prejudice. (*People v. Massie, supra*, 40 Cal.3d at p. 625.). Because appellant's actions effectively undermined his counsel's unequivocal withholding of consent to his guilty plea to a capital offense and the reliability of the judgment, the murder convictions and special circumstance findings must be reversed. As a result, the death judgments predicated on those convictions must also be reversed.

D. A Death Judgment Based on a Slow Plea of Guilty Violates the Eighth and Fourteenth Amendments

Moreover, a reversal is required not only because the court allowed appellant to effectively plead guilty without the consent of his counsel, in violation of section 1018, but also because the proceedings below were inconsistent with the requirements of the Eighth and Fourteenth Amendments. As this Court recognized in *Alfaro* and *Chadd*, the animating principle of the 1973 amendment to section 1018 requiring counsel's agreement to a plea in a death penalty or life without the possibility of parole case is a concern for the just imposition of the death penalty.

> This amendment [was not] adopted as an isolated statute in the 1973 session. [I]t was an integral part of the Legislature's extensive revision of the death penalty laws in response to the decision of the United States Supreme Court in *Furman v. Georgia* (1972) 408 U.S. 238, (Stats.1973, ch. 719, ss 2-6, pp. 1297-1300.) That revision, of course, was an effort to eliminate the arbitrariness that *Furman* found inherent in the operation of prior death penalty legislation. (See *Rockwell v. Superior Court* (1976) 18 Cal.3d 420.) The fact that the requirement of counsel's consent to guilty pleas in capital cases was enacted as part of that statutory scheme demonstrates that the Legislature intended it to serve as a

further independent safeguard against erroneous imposition of a death sentence.

(*People v. Chadd, supra,* 28 Cal.3d at p. 750; *People v. Alfaro, supra,* 41 Cal.4th at p. 1300.)

In the present case, when defense counsel refused to allow appellant to plead guilty, the trial court allowed appellant to fire his attorney, accepted appellant's admission of guilt to the non-capital offenses charged, and oversaw a guilt and penalty phase which was effectively a slow plea of guilt. Such a procedure cannot be reconciled with section 1018's purpose of "eliminat[ing] arbitrariness" serving "as a further independent safeguard against the erroneous imposition of a death sentence." (*People v. Chadd, supra,* 28 Cal.3d at p. 750.)

Reliability in a capital case is served by the assistance of counsel, whose consent to a guilty plea ordinarily assures that there is a legally sufficient basis for conviction and the absence of any potentially viable defenses. Reliability is also served by the adversary process itself, through cross-examination and the presentation of defense evidence and argument. (*United States v. Cronic*) The absence of these protections in this case undermines the reliability of appellant's convictions and the death judgment, in violation of the Eighth Amendment and the Sixth and Fourteenth Amendments. (*Beck v. Alabama* (1980) 447 U.S. 625, 637 [because of the "significant constitutional difference between the death penalty and lesser punishments," Supreme Court will invalidate procedural rules that diminish the reliability of the guilt determination in a capital case]; United States v. Cronic, supra, 466 U.S. 656-657 ["When a true adversarial criminal trial has been conducted...the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character

as a confrontation between adversaries, the constitutional guarantee is violated."].)

The proceedings below were "an unseemly spectacle of an empty charade." (*People v. Howard* (1992) 1 Cal.4th 1132, 1197 (Mosk, J., conc. and dis. opinion), and the judgment must be reversed.

//

//

IV.

THE TRIAL COURT'S ERRONEOUS REFUSAL TO CONSIDER APPELLANT'S DRUG USE IN MITIGATION VIOLATED APPELLANT'S RIGHTS UNDER STATE LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS, AND COMPELS REVERSAL OF THE DEATH JUDGMENT

A. Relevant Facts

During appellant's preliminary hearing, multiple witnesses testified that appellant appeared to be under the influence of drugs when committing the robberies charged in the amended Information. Gabriel Tovar, who was carjacked by appellant, said that appellant did not appear angry, rather "it didn't seem like he was there. . . his eyes were just, like, big." (1 RTL 251-252.) Sherrie Allen, an employee at Baskin Robbins, who was working when appellant committed an armed robbery there on December 10, 1999, testified that appellant's eyes stood out to her because "the whites of his eyes was yellow, like it wasn't real pure white like most people's eyes. And I think he was high or on some drugs because they were real beadie [sic]." (1 RTL 259.) Allen also testified that she thought appellant might have been under the influence because he said "he wanted what my co-worker was making, [referring to it as] a banana split, and it was a drink in a cup. There's no way you can mix them up." (1 RTL 263; 1 RTL 253.) Allen's co-worker, Elsie Bobo, also testified that "when he [appellant] first came in, I thought he was high because his eyes were kind of bloodshot in a way." (1 RTL 268.) The trial court reviewed this evidence prior to accepting appellant's pleas of guilty to the non-capital charges. At that time appellant was told that the prosecutor would rely on the preliminary hearing transcript at the penalty phase to prove aggravation, and in fact the prosecutor did so. (1 RTS 51, 55-56; 2 RTS 421-425.)

At the court trial, Martina Daniels testified that after the Carolina homicide, appellant was drinking and smoking drugs. (1 RTS 154.) Jennifer O'Neal, Daniels' girlfriend during that time, testified that appellant was smoking cocaine prior to and after the Carolina homicide. (1 RTS 192-193.) O'Neal stated that on the night of the Carolina homicide, appellant was "high" on cocaine. "He was aggressive, very aggressive. He was not, to me – in my opinion he was not in a normal state of mind. He was not rationally thinking to me." (1 RTS 195.) When the prosecutor finished questioning O'Neal, the court questioned her about appellant's drug use the evening of the Carolina homicide. The court's questions were directed at appellant's level of intoxication on the night of the homicide – whether appellant knew where he was going that night and his driving pattern. (1 RTS 194-196.) The court did not ask questions regarding appellant's history of drug abuse in general, although O'Neal testified that she had seen appellant under the influence of cocaine multiple times over the years. (1 RTS 195.)

At the penalty phase of appellant's trial, the prosecutor introduced into evidence appellant's 1988 conviction for a violation of Health and Safety Code section 11350, subdivision (a), possession of cocaine, and appellant's 1990 conviction for a violation of Health and Safety Code section 11352, possession for sale of cocaine. (2 RTS 333; 3 CTA 826-848)

On January 31, 2001, after reading through the statutory aggravating and mitigating factors of Penal Code section 190.3 (hereafter "section 190.3"), the trial court, sitting as the finder of fact, imposed death. (2 RTS 459-462.) At this time, the trial court offered no reason for its determination.

On February 14, 2001, at the motion to modify the verdict pursuant to section 190.4, subdivision (e), the trial court, in declining to modify its earlier verdict to life without parole, gave its reasoning for the imposition of death. (2 RTS 464-470.) The court again read the statutory factors of section 190.3. As to section 190.3, subdivision (h),[30] the court acknowledged the evidence of defendant's drug use on the night of the Carolina robbery and homicide. However, pursuant to subdivision (h), which requires a nexus between the drug use and the offense, the trial court refused to consider this a mitigating circumstance:

> There was evidence that prior to the killing of Mr. Carolina, Mr. Daniels had ingested three cigarettes laced or filled with cocaine. As stated on the record during the guilt phase of the trial, Mr. Daniels' other actions on the flight [sic] of Mr. Carolina's death indicate that he was able to understand the nature and criminality of his actions. The facts do not constitute a mitigating circumstance.

(2 RTS 468.)

As to 190.3, subdivision (k), "any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime," the trial court did not refer to appellant's drug use as a mitigating factor, but said that appellant's apologies to the families of the victims at the close of the penalty trial "may" have been mitigating. (2 RTS 468-469.)

---

[30] Section 190.3, subdivision (h), states, "whether or not *at the time of the offense* the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication." (Emphasis added.)

B. The Trial Court Erred When It Limited Its Consideration of Appellant's Drug Use to His State of Mind at the Time of the Capital Crimes

The trial court had before it evidence of appellant's regular and substantial drug use.[31] However, the trial court refused to treat such evidence as a mitigating factor and improperly limited its consideration of such evidence to that stated in section 190.3, subdivision (h): whether appellant was sufficiently intoxicated on the night of the Carolina homicide such that appellant could not understand the nature and criminality of his conduct. In this way, the trial court restricted its consideration of appellant's drug use to the issue of whether it was causally connected, or had a nexus to, the capital murder charges. Although the trial court could have considered evidence of appellant's repeated and substantial drug use as mitigating in and of itself under section 190.3, subdivision (k), it is clear from this record that the trial court did not do so. This was prejudicial constitutional error.

The Supreme Court has repeatedly held, in case law extending more than two decades before appellant's trial, that no such nexus is required in capital cases and that a trial court's refusal to consider mitigating evidence unless it provides a legal excuse for the crime requires reversal of a death sentence. (*Lockett v. Ohio* (1978) 438 U.S. 586; *Eddings v. Oklahoma* (1982) 455 U.S. 104; *Tennard v. Dretke* (2004) 542 U.S. 274; *Smith v. Texas* (2004) 543 U.S. 37 (per curiam).) This Court has, of course, followed this jurisprudence and held that no nexus is required between the

---

[31] In addition to sitting as the trier of fact at the guilt and penalty phases, the trial court read the transcript of appellant's preliminary hearing. (1 RTS 60; 64-65.)

crime charged and mitigating evidence. (*People v. Brown* (2003) 31 Cal.4th 518, 577-578 [section 190.3, subdivision (k) requires no nexus between crime charged and sympathetic evidence of defendant's background and family history].)

In 1978, the *Lockett* plurality struck down an Ohio statute that allowed courts to consider only specified mitigating factors. (*Lockett v. Ohio, supra*, 438 U.S. at pp. 609-611.) The Court held that, "in all but the rarest kind of capital case [the sentencer should] not be precluded from considering *as a mitigating factor* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (*Id.* at p. 604; emphasis in original.)

In *Eddings,* a Court majority extended *Lockett* and held that an Oklahoma trial court and the Oklahoma Court of Criminal Appeals violated the Eighth Amendment when it refused to consider evidence of a defendant's abusive childhood because that abuse did not provide a legal excuse from criminal responsibility. The Supreme Court found that such a limitation on mitigating evidence violated the rule of *Lockett*. (*Eddings v. Oklahoma, supra*, 455 U.S. at pp. 113-115.)

In *Tennard v. Dretke, supra,* 542 U.S. at p. 277, the defendant introduced evidence at trial of his 67 IQ. However, in deciding whether to impose a death sentence, the jury was instructed to consider only whether the defendant's conduct was deliberate and whether the defendant presented a future danger. (*Id.* at pp. 277-278.) As both special issues were answered in the affirmative, Tennard was sentenced to death. (*Ibid.*) The Texas Court of Criminal Appeals rejected Tennard's claim that the jury was not given a vehicle with which to consider Tennard's mental disability. The

state court held that "there [was] no evidence [that Tennard's] low IQ rendered him unable to appreciate the wrongfulness of his conduct when he committed the offense." (*Id.* at p. 279.) On federal habeas review, the district court and later the Fifth Circuit upheld the state court's decision. In so deciding, the Court of Appeals applied a "constitutionally relevant" test, under which mitigating evidence need not be considered unless "the criminal act was attributable to [a] severe permanent condition." (*Id.* at p. 283.) The Supreme Court soundly rejected the requirement that mitigating evidence must have a nexus to the crime at issue: "[W]e cannot countenance the suggestion that low IQ evidence is not relevant mitigating evidence . . unless the defendant also establishes a nexus to the crime." (*Id.* at p. 287.)

In its next term, the Court again explicitly rejected a Texas court's refusal to consider mitigating evidence of a defendant's low IQ and troubled childhood unless there was a "nexus" between the mitigating circumstance and the murder. (*Smith v. Texas, supra,* 543 U.S. at p. 45.) The Court found that such a "nexus test" was "a test it had never countenanced and now unequivocally rejects." (*Ibid.*) Three years later, the Court re-iterated its insistence that the Eighth Amendment requires not only that a trial court admit relevant mitigating evidence, but also that the trier of fact exercise its separate constitutional duty to consider such mitigating evidence. (*Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233, 250, fn. 12, 260) [death judgment reversed because standard Texas instructions did not permit jury to give "meaningful, mitigating effect" to defendant's evidence of childhood abuse, neglect, and psychological problems, including impaired impulse control.)

Lower federal courts have applied these cases to set aside death

judgments imposed by sentencers other than a jury where, as here, the record reflects an unconstitutionally narrow consideration of mitigating evidence. For example, in *Styers v. Schiro* (9th Cir. 2008) 547 F.3d 1026, cert. den. 130 S.Ct. 379, the Arizona Supreme Court found an aggravating factor applied in the trial court to be invalid. Accordingly, the Arizona Supreme Court re-weighed all the evidence of the mitigating factors against that of the valid aggravating factors. In this re-weighing process, the reviewing court addressed evidence that Styers suffered from post-traumatic stress disorder and stated that PTSD could constitute mitigation, but only when it could be causally connected to the criminal conduct at issue. (*Id.* at p. 1035.) The Court of Appeal held that this requirement of a causal connection between Styers mental condition and criminality violated *Eddings* and *Smith*. (*Id.* at pp. 1035-1036.)

Similarly, in *Williams v. Ryan* (9th Cir. 2010) 623 F.3d 1258, Williams presented evidence of his own drug abuse as a mitigating factor in the penalty phase of his capital trial. The state trial court, in imposing sentence, ruled that Williams had failed to establish that his drug use was mitigating as there was no evidence that Williams' drug use was a factor in the perpetration of the murder. (*Id.* at p. 1270.) The Arizona Supreme Court affirmed this ruling on direct appeal, stating that a defendant's drug use was only mitigating if the defendant could show that he was intoxicated at the time of the murder. (*Ibid.*) The Ninth Circuit Court of Appeals granted habeas relief and set aside the death judgment, holding that the Arizona Supreme Court's decision was contrary to clearly established federal law as the Supreme Court had consistently rejected the application of such a nexus test to mitigating evidence. (*Ibid.*, citing *Smith v. Texas, supra*, 543 U.S. at p. 45; *Tennard v. Dretke, supra,* 542 U.S. at pp. 284-87;

Eddings v. Oklahoma, supra, 455 U.S. at pp. 114-15; and *Lockett v. Ohio, supra*, 438 U.S. at pp. 604-606.)

In the present case, while the court received evidence of appellant's drug use, the court considered it only to the extent that it was causally connected to the Carolina homicide under section 190.3, subdivision (h). Indeed, the court's own questioning of witness O'Neal revealed that the court was only concerned with appellant's drug use the night of the Carolina homicide.[32]

---

[32] The Court: Now, as I understand it, before you arrived there, what I just referenced to you, this apartment where the alleged crime occurred –

The Witness [O'Neal]: Yes.

The Court – do you know what we are talking about?

O'Neal: (Nodding)

The Court: You said before then he was high?

O'Neal: Yes, he was high.

The Court: And that he had smoked three cocaine laced, rather rocks in a cigarette, right?

O'Neal: Yes.

The Court: Now, what specifically do you mean he was high? Can you specifically describe, you know, how he was acting or –

O'Neal: Yes, I can.

The Court: His manner of walking or talking or speech or anything beyond just the flat statement that he was high?

The similarity between the trial and reviewing courts' actions in *Eddings* and that of the trial court in the present case is striking. In *Eddings*, the Court of Criminal Appeals wrote:

> There is no doubt that the petitioner has a personality disorder. But all the evidence tends to show that he knew the difference between right and wrong at the time he pulled the trigger, and that is the test of criminal responsibility in this

---

O"Neal: Yes, I can. He was very aggressive, very aggressive. He was not, to me – in my opinion he was not in a normal state of mind. He was not rationally thinking to me.

The Court: Had you seen him under the influence of specifically this type of narcotic before?

O'Neal: Yes, I have.

The Court: And on how many occasions?

O'Neal: Oh, several occasions over the years.

The Court: But nevertheless being high or not, he seemed to indicate where he wished to go that evening by way of driving the car?

O'Neal: Yes. He never stated that that's where he was going to me or to anyone in the car. That's where he went. He drove there. I had no knowledge the whole evening where we were going. I was basically just a passenger.

The Court: When he drove the car to this place, how was he driving? What was his driving pattern, if any? Did he seem to drive okay?

O'Neal: He was driving okay, a little fast, but he was driving normally, I'd say.

The Court: All right.

(1 RTS 194-196.)

> State. *Gonzales v. State,* Okl.Cr., 388 P.2d 312 (1964). For the same reason, the petitioner's family history is useful in explaining why he behaved the way he did, but it does not excuse his behavior.

(*Eddings v. State* (1980) 616 P.2d 1159, 1160, cited in *Eddings, supra,* 455 U.S. at p. 113.)

In the present case the trial court stated that appellant's drug use did not prevent him from "understand[ing] the nature and criminality of his actions." (2 RTS 468.) In other words, the trial court in the present case proffered the *same reason* for not considering appellant's drug history as did the trial court and reviewing court in *Eddings*: Eddings "knew the difference between right and wrong;" appellant was "able to understand the nature and criminality of his actions."

The Supreme Court's holding in *Eddings* could just as well have been written about the trial court's finding in this case:

> Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence. In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings profferred on his behalf. The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

(*Eddings v. Oklahoma, supra*, 455 U.S. at pp. 114-115.)

Of course, the trial court in the present case could have considered appellant's drug addiction under section 190.3 subdivision (k), but it is clear from this record that it did not. In *Boyde v. California* (1990) 494 U.S. 370, 380, the Supreme Court held that the proper legal standard for reviewing whether an instruction is ambiguous and therefore subject to an

erroneous interpretation is "whether there is a reasonable likelihood that the sentencer has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." In the present case, regardless of the clarity of section 190.3, one does not have to assess whether it was "reasonably likely" that the trier of fact misapplied the instruction and therefore failed to consider mitigating evidence; one knows from this record that the sentencer was in fact, in the language of *Boyde*, "impermissibly inhibited" from considering mitigating evidence. The trial court referred to appellant's apologies to the victims' families, as possible mitigating evidence under section 190.3, subdivision (k) (2 RTS 469), but it did not return to the evidence of appellant's substantial drug use, evidence of which it was well aware. Nor did the court ask questions of any witness regarding appellant's drug use in general, as it had of appellant's specific level of intoxication on the night of the Carolina homicide. Thus, the record reveals that the trial court's consideration of appellant's drug abuse was limited to section 190.3, subdivision (h), whether appellant was sufficiently intoxicated on the night of one homicide.

Because the trial court sitting as the sentencer erred by failing to give full effect to the mitigating evidence of appellant's drug use, the resulting death sentence violated the Eighth and Fourteenth Amendments.

C. The Trial Court Not Only Failed to Consider Appellant's Drug Addiction as Mitigation But Also Committed *Lockett* Error by Refusing to Fully Consider Appellant's Impairment at the Time of the Crime

The trial court's statements regarding its consideration of section 190.3, subdivision (h), reveals that the court improperly limited consideration of appellant's mental condition and the effects of intoxication, in violation of the plain language of Section 190.3, subdivision

(h), and in violation of the Eighth Amendment. (See *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604; *Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 110.)

A person is legally insane if, at the time of the offense, he or she was incapable of knowing or understanding the nature and quality of his or her act or of distinguishing right from wrong. (*People v. Skinner* (1985) 39 Cal. 3d 765, 776-777; section 25, subdivision (b).) The test for 190.3, subdivision (h), is broader than this test in two fundamental ways. First, subdivision (h) requires the trier of fact to consider as mitigating evidence whether a defendant is "impaired" as a result of intoxication, not whether a person is completely incapable of understanding what he or she is doing or incapable of understanding right from wrong. Second, the test for subdivision (h) requires the trier of fact to also view evidence of intoxication as mitigating when it impairs a defendant's ability to conform his or her conduct to the requirements of law. That is, a defendant may appreciate his or her criminality intellectually and yet the effects of intoxication may still impair his or her ability to *act* lawfully. Because the trial court applied the incorrect test and therefore refused to appropriately consider appellant's intoxication, the court committed *Lockett* error.

1. The trial court only considered whether appellant was legally insane at the time of the offense, not whether appellant was impaired.

Section 190.3, subdivision (h), requires the trier of fact to consider evidence of intoxication, regardless of whether it provides a complete defense to the offense. (*People v. Marshall* (1996) 13 Cal.4th 799, 857.) In contrast to the test for insanity, section 190.3, subdivision (h), contemplates a mental impairment less than insanity in that it asks only if a person is "impaired" as a result of intoxication. (*People v. Haskett* (1990) 52 Cal.3d

232, 233; *People v. Babbitt* (1988) 45 Cal.3d 660, 721 ["Whereas the insanity instruction requires that a defendant lack 'substantial capacity' to appreciate the criminality of his conduct or to conform his conduct to the law, subdivision (h) requires only that his capacity to do so be 'impaired.' The difference between the two standards is readily apparent."]

In *People v. Lucero* (1988) 44 Cal.3d 1006, this Court held that the trial judge improperly excluded from the jury's consideration evidence of defendant's mental disorder in violation of *Lockett, Eddings,* and *Skipper*. This Court found that the Eighth Amendment and analogous California law required a jury to consider a defendant's psychological disorder as a factor in mitigation regardless of whether it caused the defendant to commit the crimes. (44 Cal.3d at p. 1030.) Such error was prejudicial, demanding reversal. (*Id.* at p. 1031.)

In the present case, the court read the appropriate statutory language of section 190.3, subdivision (h). However, in its statement regarding this factor, the court clearly limited its consideration of appellant's intoxication as a result of cocaine use on the night of the Carolina homicide to whether he was "able to understand the nature and criminality of his actions." (2 RTS 468.) The court did not consider whether appellant was simply "impaired" that night, of which there was ample evidence presented. O'Neal, who was appellant's girlfriend and knew him well for four years (2 RTS 171), testified that on the night of the Carolina homicide appellant was high and acting " very aggressive, very aggressive. He was not, to me – in my opinion he was not in a normal state of mind. He was not rationally thinking to me." (1 RTS 195.) Instead of considering this evidence of the *impairment* of appellant's thinking by someone who knew him well, the court ignored it and required a heightened standard – the standard for legal

insanity – in order to consider the evidence mitigating. Finding that appellant did not meet this higher standard, the court stated that "the facts do not constitute a mitigating circumstance." (2 RTS 468.) This was error.

2. The trial court did not consider whether appellant's ability to conform his conduct to the requirements of law was impaired as a result of intoxication.

Section 190.3 subdivision (h), incorporates part of the language contained in the American Legal Institute's Model Penal Code test for insanity which states: "'A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law.'" (*People v. Drew* (1978) 22 Cal. 3d 333, 336, fn. 3, citing Model Pen. Code, Proposed Official Draft (1962) s 4.01, subpart (1).) Subsection (h) also refers in the disjunctive to the capacity of the defendant "to appreciate the criminality of his conduct *or* to conform his conduct to the requirements of law." Section 190.3, subdivision (h), however, is broader than the ALI test, as 1) it allows for the effects of intoxication as well as mental disease or defect to be considered, and 2) it only requires that a defendant be "impaired" not lacking "substantial capacity."

In *Drew, supra,* this Court explained why the ALI test of insanity was superior to the *M'Naghten* test, then in use in California.[33]

---

[33] In June 1982, the *M'Naghten* test was re-instated by initiative as the test for insanity in California by Proposition 8 and thus *Drew's* holding was superceded. (*People v. Skinner, supra*, 39 Cal. 3d at p. 768.) However, the reasoning of *Drew* regarding the ALI test is applicable as section 190.3, subdivision (h), has a similar "inablity to conform conduct" prong. As argued *supra,* the *M'Naghten* test was the test the trial court incorrectly

Despite its widespread acceptance, the deficiencies of *M'Naghten* have long been apparent. Principal among these is the test's exclusive focus upon the cognitive capacity of the defendant, an outgrowth of the then current psychological theory under which the mind was divided into separate independent compartments, one of which could be diseased without affecting the others. (See *United States v. Currens* (3d Cir. 1961) 290 F.2d 751, 766.) As explained by Judge Ely of the Ninth Circuit: 'The *M'Naghten* rules fruitlessly attempt to relieve from punishment only those mentally diseased persons who have no cognitive capacity . . . . This formulation does not comport with modern medical knowledge that an individual is a mentally complex being with varying degrees of awareness. It also fails to attack the problem presented in a case wherein an accused *may have understood his actions but was incapable of controlling his behavior*.'

This Court continued:

M'Naghten's exclusive emphasis on cognition would be of little consequence if all serious mental illness impaired the capacity of the affected person to know the nature and wrongfulness of his action. Indeed, the early decision of *People v. Hoin* (1882) 62 Cal. 120, 123, in rejecting the defense of "irresistible impulse," rested on this gratuitous but doubtful assumption. Current psychiatric opinion, however, holds that mental illness often leaves the individual's intellectual understanding relatively unimpaired, but so *affects his emotions or reason that he is unable to prevent himself from committing the act.* (See *United States v. Smith* (6th Cir. 1968) 404 F.2d 720, 725.) '(I)nsanity does not only, or primarily, affect the cognitive or intellectual faculties, but affects the whole personality of the patient, including both the will and the emotions. An insane person may therefore often know the nature and quality of his act and that it is wrong and forbidden by law, and yet commit it as a result of the mental disease.' (Rep. Royal Com. on Capital Punishment, 1949-1953, p. 80.)

---

applied in the instant case.

(*People v. Drew, supra*, 22 Cal. 3d at pp. 341-342, superceded by statute as stated in *People v. Skinner, supra*, 39 Cal. 3d at p. 769; emphasis added.)

Thus, section 190.3, subdivision (h), requires the trier of fact to consider whether, even if a defendant could appreciate his or her criminality, his or her ability to control conduct was impaired. That one of the marks of cocaine use, like most drugs, is impaired impulse control is hardly novel. A 1989 publication by the United States Department of Justice recognized that

> [t]he smoking of crack is the most efficient way of ingesting cocaine and the crack user receives an almost instantaneous, intense high lasting only a short period (usually eight to ten minutes) which is often followed by depression and manic episodes. *The primary danger of crack is the drug's ability to cause an extremely rapid and severe addiction that controls the users behavior and dominates their lives.* Many crack users also become addicted to alcohol, tranquilizers and heroin, which are all taken to alleviate the unpleasant side effects of crack use.

(United States Department of Justice Drug Enforcement Administration, "Crack Cocaine Overview 1989," at p. 3; emphasis added.) Therefore, the bigger issue for the court in assessing subdivision (h) was not whether, in the words of the court, appellant could "understand the nature and criminality of his actions," but whether his ability to conform his conduct to the law– the ability to control his impulses – was impaired. That the trial court did not address this second aspect of subdivision (h) was prejudicial error in two distinct ways.

First, the prosecutor argued, that murder was first degree felony murder, committed while appellant was engaged in the commission of robbery and burglary. (2 RTS 294-295.) The necessary mens rea was the specific intent to steal, which did not implicate appellant's cognitive or

intellectual abilities or impairment as fully as they would have been had intent to kill, or premeditation or deliberation been at issue, but which did implicate his ability to control his behavior. There was evidence of appellant's intoxication and there was nothing in the nature of the crime to negate that impairment. Second, the particular facts of the crime revealed that it was appellant's inability to control his conduct due to intoxication that led to the commission of the homicide. Appellant shot Carolina and Hillian after being shot himself. Even a reasonable person, whose ability to control his or her conduct was not impaired by intoxication, would be hard pressed to control his reaction in such a situation. However, given appellant's intoxication, his ability to control his conduct was impaired and thus, was mitigating evidence under factor (h) of section 190.3.

D. The Trial Court's Refusal to Consider Mitigating Evidence Requires Reversal Without an Inquiry Into Prejudice

When the sentencer has refused to, or been precluded from, considering relevant mitigating evidence, the United States Supreme Court has held that the sentencing procedure is "fatally flawed," without reference to prejudice. (*Abdul-Kabir v. Quarterman*, *supra,* 550 U.S. at p. 264.)

In *Nelson v. Quarterman* (5th Cir. 2006) 472 F.3d 287 (en banc), cert. den. 127 S.Ct. 2974, the Fifth Circuit examined the Supreme Court's *Lockett/Penry* jurisprudence, concluding that the state's argument that harmless error analysis applied when the jury was precluded from giving full effect to a defendant's mitigating evidence was incorrect. Observing that the Supreme Court had "*never* applied a harmless error analysis . . . or given any indication that harmless error might apply" in its many decisions finding *Lockett* error, the court reasoned that this is because the error

deprives the sentencer "of a 'vehicle for expressing its 'reasoned *moral* response to the defendant's background, character, and crime,' " which precludes it from making " 'a reliable determination that death is the appropriate sentence.'" [Citations omitted.]" (*Nelson, supra,* 472 F.3d at pp. 314-315; emphasis in original.) The reasoned moral judgment made by the sentencer "differs from [the] fact-bound judgments made "in other contexts and from "cases involving defective jury instructions in which the Court has found harmless review error to be appropriate." (*Id.* at p. 315.) The *Nelson* court concluded,

> Given that the entire premise of the *Penry* line of cases rests on the possibility that the [sentencer's] reasoned moral response might have been different from its answers to the special issues had it been able to fully consider and give effect to the defendant's mitigating evidence, it would be wholly inappropriate for an appellate court, in effect, to substitute its own moral judgment for the [sentencer's] in these cases.

(*Id.* at p. 315.)

One year after *Nelson,* in *Abdul-Kabir, supra*, the Supreme Court implicitly answered in the negative the question whether harmless error was ever an appropriate consideration in cases involving *Lockett* error:

> Our cases following *Lockett* have made clear that when the jury is not permitted to give meaningful effect or a 'reasoned moral response' to a defendant's mitigating evidence – because it is forbidden from doing so by statute or a judicial interpretation of a statute – the sentencing procedure is fatally flawed.

Accordingly, the Court reversed the lower court's denial of relief and set aside the death judgment without engaging in an analysis of prejudice and without directing the lower court to assess prejudice. (*Abdul-Kaabir v. Quarterman, supra,* 550 U.S. at pp. 264-265.)

In cases decided after *Nelson* and *Abdul-Kabir,* courts in the Fifth Circuit have consistently set aside death judgments after determining that there was a "reasonable likelihood that the [sentencer] would interpret the instructions in a manner that precluded it from fully considering and giving full effect to all of defendant's mitigating evidence," without consideration of the strength of the aggravating evidence. (*Coble v. Quarterman* (5th Cir. 2007) 496 F.3d 430, 444; *Pierce v. Thaler* (5th Cir. 2010) 604 F.3d 197, 206-210; *McCowen v. Thaler* (S.D. Texas 2010) 717 F.Supp.2d 626, 648; *Rivers v. Quartermain* (S.D. Texas 2009) 661 F.Supp.2d 675, 688.) In this case, there is more than a "reasonable likelihood" that the sentencer did not consider and give full effect to the mitigating evidence; the trial court's own findings make it a certainty.

Obviously, a sentence that is the result of a procedure that the Supreme Court has termed "fatally flawed" cannot be affirmed. In the present case, because the trial court interpreted section 190.3 in such a way as to preclude from consideration appellant's drug use, the resulting sentencing procedure violated the Eighth Amendment and the death judgment must be set aside, without reference to prejudice.

Prior to the decision of the United States Supreme Court in *Abdul-Kabir*, this Court had held that when the sentencer is precluded from considering relevant mitigating evidence, reversal is not necessarily required. Instead, the reviewing court must determine if the error was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 24. (*People v. Brown, supra*, 31 Cal.4th at p. 578; *People v. Roldan* (2005) 35 Cal.4th 646, 739.) In view of the federal authority cited above, appellant requests this Court to reconsider whether *Lockett* error can ever be harmless, and hold that a death sentence imposed without

consideration of relevant mitigating evidence is reversible per se.

E. Assuming Arguendo That *Lockett* Error Is Subject to Harmless Error Analysis, The Trial Court's Error Was Not Harmless Beyond a Reasonable Doubt

Even assuming a harmless-error standard of review for appellant's death sentence, the state cannot meet this heavy burden of proof in the instant case. Under *Chapman*, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." (*Chapman v. California* (1967) 386 U.S. 18, 24.) The "burden of proof" as to prejudice rests on the government. "Certainly error, constitutional error . . . casts on someone other than the person prejudiced by it a burden to show that it was harmless.... [T]he beneficiary of a constitutional error [is required] to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Ibid.*) When the constitutional error occurred at the penalty phase of a capital trial, the court must proceed with special caution. (See *Satterwhite v. Texas* (1988) 486 U.S. 249, 258 [stating that "the evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer"].) In such a situation, the burden of proof must be deemed very heavy indeed.

In the present case, although appellant did not present evidence in mitigation, there was mitigating evidence presented in the circumstances of the homicides themselves, as neither homicide involved an intent to kill. In the Carolina homicide, the court found that the victim "fired the first shot or shots." (2 RTS 306-307.) While the trial court also found that Carolina had the right to defend himself and thus was legally justified in shooting

appellant (2 RTS 307), that does not change the fact that appellant's shooting of Carolina was a panicked response to being shot at, done without any reflection or specific intent.

Nor did appellant intend to kill LaTanya McCoy during the police pursuit in which his automobile struck the car she was driving. This homicide was prosecuted as a second degree murder, on the theories of implied malice and second degree felony murder (2 RTS 298-299, 312.), and the court so found. Standing alone, it would not have supported a death sentence for appellant. In sum, both of the murders for which appellant received death sentences were unintentional homicides.

Other circumstances in aggravation included appellant's crimes in the weeks prior to the homicides and the shooting of the officer at the scene of the McCoy homicide. But as noted above, appellant was observed by witnesses to be under the influence during some of these crimes. In the prosecutor's view, the shooting of the officer evinced a desire on the part of appellant to commit suicide (2 RTS 441), which suggests a cognitive, functional or emotional impairment.

While the evidence of aggravation contained in the undeveloped and unchallenged trial record was not insignificant, had the trial court truly considered appellant's drug use, a reasonable doubt is raised as to the appropriateness of appellant's death sentence. The Eighth Amendment requires that the sentencer consider the individual limitations and frailties of a defendant prior to imposing a death sentence.

> If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged

> background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California v. Brown* (1987) 479 U.S. 538, 545 (O'CONNOR, J., concurring). Moreover, *Eddings* makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence. *Hitchcock v. Dugger, supra.* Only then can we be sure that the sentencer has treated the defendant as a "uniquely individual human bein[g]" and has made a reliable determination that death is the appropriate sentence. *Woodson*, 428 U.S., at 304, 305.

(*Penry v. Lynaugh* (*Penry I*) (1982) 492 U.S. 302, 319.)

That drug use and its effect is one such limitation on an individual and as such, can be powerful mitigating evidence, was recognized by the Supreme Court in *Cone v. Bell* (2009) 556 U.S. 449, 129 S.Ct 1769. In that case, Cone robbed a jewelry store in Memphis, Tennessee. While fleeing the scene by car, he led police on a high-speed chase into a residential neighborhood. Once there, he abandoned his vehicle – which contained $2400 in cash from a previous day's grocery store robbery, stolen jewelry, and large quantities of drugs -- and shot a police officer and bystander who attempted to stop his flight. A short time later, Cone tried to hijack a nearby car. When that attempt failed, Cone tried to shoot the driver and a hovering police helicopter. He then was able to escape from the scene. The next day, Cone reappeared in the same neighborhood at the door of an elderly woman. He asked to use her telephone, and when she refused, he threatened her with a gun. Before he was able to gain entry, the woman slammed the door and called the police. By the time officers arrived, however, Cone had once again disappeared. That afternoon, Cone did manage to gain entry to the home of a 93-year-old man and his 79- year-old wife. Cone beat the

couple to death with a blunt instrument and ransacked the first floor of their home. Later, he shaved his beard and escaped to the airport without being caught. Cone then traveled to Florida, where he was arrested several days later after robbing a drugstore. (*Cone*, 129 S.Ct. at p. 1773.)

After the prosecution was found to have suppressed evidence of Cone's drug use, the Supreme Court reversed his death sentence. The Court held that while this evidence was not material to his underlying guilt for the crimes, it was evidence that mitigated against the death penalty as it could have reasonably reduced his personal culpability in the mind of the jury, notwithstanding the extreme circumstances in aggravation. (*Cone v. Bell, supra,* 129 S.Ct. at pp. 1785-86.)

Capital case law allowing sentencers to consider drug use and its effects in assessing personal culpability parallels scientific research relating to addiction, brain damage, and brain functioning. (See Tanabe, et.al. *Medial orbitalfrontal cortex gray matter is reduced in abstinent substance dependent individuals,* Biol. Psychiatry, 2009 January 15; 65(2): 160-164;[34] [MRI imaging of brains of substance dependent users after prolonged period of abstinence revealed a lower gray matter volume in orbitalfrontal cortex relative to control group; testing of subjects revealed a corresponding correlation found between reduced gray matter volume and a disrupted cognitive process, including poor decision making ability].) A person's long-standing drug use may result in severe mental and emotional problems which the trier of fact must consider in performing its moral duty to treat the convicted capital defendant as a unique human being.

---

[34] Author manuscript available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2640220/pdf/nihms85558.pdf

There exists a reasonable doubt that consideration of appellant's actions would have resulted in a life sentence had the trial court made a reasoned moral choice that necessarily included a full consideration of appellant's drug use and drug impairment on the night of the Carolina homicide as mitigating evidence. Indeed, the double homicide and multiple attempted murders in *Cone* involved the specific intent to kill, in contrast to the circumstances of the present case. Yet, the Supreme Court still held that the suppressed evidence "may well have been material to the jury's assessment of the proper punishment." (*Cone v. Bell, supra,* 129 S.Ct. at p. 1786.) A fortiori, under *Chapman's* less forgiving test of prejudice, the state cannot demonstrate that the trial court's failure to consider the evidence of appellant's drug use did not contribute to the death verdict.

//

//

V.

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

California 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 Pen. Code, § 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.)

This Court has recognized and reaffirmed the independent review requirement of section 190.4, subdivision (e). (See, e.g., *People v. Rodriguez, supra,* 42 Cal.3d at pp. 793-794 ["By providing for automatic review of a death verdict under section 1181, subdivision 7 [in] 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. Allison* (1989) 48 Cal.3d 879, 914 ["In accordance with the plain meaning of the 1977 language, the court was

required in ruling on the automatic motion to make an 'independent determination' of the 'weight of the evidence,'" quoting *People v. Frierson* (1979) 25 Cal.3d 142, 193, fn. 7 (conc. opn. of Mosk, J.)].)

With respect to judge-sentenced capital defendants like appellant, however, California's death penalty statute is unconstitutional in that it fails to provide a mechanism for an independent review of a trial court's penalty phase verdict. Obviously, a trial court cannot "independently" review its own verdict. Black's Law Dictionary (8th ed. 2004) at p. 785 defines "independent" as "1) not subject to the control or influence of another; 2) not associated with another (often larger) entity; 3) not dependent or contingent on something else." California courts have held that an "independent" judicial determination implies a separateness and autonomy from an earlier decision. (See, e.g., *Green v. Board of Dental Examiners* (1996) 47 Cal.App.4th 786, 796 [concluding that under the "independent judgment rule," a trial court must weigh the evidence and make its own determination as to whether administrative findings should be sustained].) Accordingly, for a trial court to conduct an "independent" review of its own verdict, the court would have to disengage intellectually from its own rulings. As argued below, the Legislature has recognized the impossibility of this, and Code of Civil Procedure, section 170.1, requires disqualification of a judge who is called upon to review his or her prior findings.

Simply put, by any definition of the word independent, a trial judge cannot conduct an independent review of the death verdict that he or she delivered. Yet California's death penalty statute affords no mechanism for allowing independent review in a case in which a jury trial has been waived, such as, for example, providing for another trial judge to review the sentencing judge's verdict. (Cf. *People v. Burgener* (2003) 29 Cal.4th 833,

892, fn. 9 [concluding that where the original judge is not available, another judge of same court may preside over rehearing of a motion to modify the verdict under section 190.4, subdivision (e)].) Absent a reading of the statute that allows for this review by an independent judge, the statute deprives judge-sentenced defendants of a critical constitutional safeguard.

In this case, the court held a section 190.4, subdivision (e), hearing two weeks after the court fixed the penalty at death. (2 RTS 463-470.) The hearing that the court conducted, however, was simply a reaffirmation of its own penalty phase verdict. (*Ibid.*) 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. 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

Precedent from the Supreme Court and this Court establish that the independent review provided for by section 190.4, subdivision (e), is a constitutionally mandated aspect of the California death penalty scheme. 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.

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 Supreme Court recognized that this stage of review serves as a critical check on the danger of unconstitutionally arbitrary death sentences. (See *Pulley v. Harris* (1984) 465 U.S. 37, 51-53.) Similarly, this Court 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, supra,* 25 Cal.3d at p. 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. For example, in *People v. Rodriguez*, the trial court declined to perform an independent review of the jury's verdict because the word "independent" had been removed from the statute as a result of the 1978 Briggs Initiative. (42 Cal.3d at pp. 792-794.) The Court vacated the 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." (*Id.* at p. 794.) The Court cited its earlier decision in *Frierson*, which held that the independent review requirement of section 190.4, subdivision (e), was an "adequate alternative safeguard[]" that allowed the statute to pass constitutional muster despite the lack of proportionality review. (*Ibid.*, citing *People v. Frierson*, *supra,* 25 Cal.3d at p. 179.) 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.

Although the language of 190.4, subdivision (e), is ambiguous, 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.[35] 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 state-wide proportionality review was the subject of debate in the Assembly just before the independent review requirement was added.[36] (Assem. Com. on

---

[35] 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."

[36] Subsection (e) first appears in Senate Bill No. 155, Fifth Amended Version, April 13, 1977; it was introduced in its entirety in Senate Bill No. 155, Sixth Amended Version, April 28, 1977. (See SB 155 Leg. Hist., at

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. 227-229].) 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.

This Court has recognized 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. 34.) 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 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). The first sentence of the subsection confers the right

---

pp. 84-119.)

inclusively, on "every case in which a trier of fact has returned a death verdict," but the subsequent sentence refers to the trial judge's duty to review the "jury's findings." (Pen. Code, § 190.4, subd. (e).)

This Court has declined on several occasions to resolve this ambiguity and has never decided whether judge-sentenced defendants are excluded from the subsection's coverage. Thus, this Court has never had to reach the question of whether a denial of a motion for modification by the same judge who conducted the court trial denies a defendant an opportunity for the type of review contemplated by the statute and therefore constitutes a federal constitutional violation. (See, e.g., *People v. Diaz, supra,* 3 Cal.4th at pp. 575-576 [acknowledging the ambiguity of the statutory language, assuming judge-sentenced defendants are entitled to a modification hearing under 190.4, subdivision (e), but declining to reach the constitutional question]; *People v. Horning* (2004) 34 Cal.4th 871, 912 [stating that Court had never determined whether judge-sentenced defendant is entitled to a motion for modification under the statute].)[37]

Despite the statutory ambiguity, appellant contends that the Legislature intended that section 190.4, subdivision (e), would require an

---

[37] 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.

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 [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(7), which provides for independent review for *all* defendants.

With respect to this last point, this Court has, on many occasions, referred to the 190.4, subdivision (e), hearing as "automatic" for defendants sentenced to death. It has never qualified that right. (See, e.g., *People v. Frierson*, *supra,* 25 Cal.3d at p. 179 [referring to defendant's "automatic" motion for modification of the verdict provided by section 190.4, subdivision (e)]; *People v. Rodriguez*, *supra,* 42 Cal.3d at p. 792 [same], *People v. Diaz*, *supra,* 3 Cal.4th at p. 571 [same].) 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. Rodriquez, 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.

C. 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, this Court has never decided whether section 190.4, subdivision (e), applies to judge-sentenced defendants, and has therefore not had occasion to discuss how an independent review of a judge-imposed death verdict would operate in practice. If the Court determines that section 190.4, subdivision (e), does apply to judge-sentenced defendants and means to provide for independent review of those verdicts at the trial court level, it should remand this case for such a review. However, if this Court determines that, contrary to the mandate of the United States and California constitutions and the apparent will of the Legislature, the California death penalty statute does *not* provide judge-sentenced defendants with a right to independent review of the penalty phase verdict, then the statute is constitutionally infirm in several ways.

1. Appellant was denied his constitutional right to due process, which requires an unbiased judge who has not prejudged the issue and a reliable sentencing procedure.

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, 129 S.Ct. 2252, 2263; *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. (*People v. Freeman* (2010) 47 Cal. 4th 993, 1001; *Caperton, supra*, 129 S.Ct. at p. 2262.) 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." (*Freeman,* at p. 1001, citing *Caperton,* at p. 2262.)

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 v. A.T. Massey Coal Co., Inc., supra,* 129 S. Ct. at pp. 2261-2262.) Moreover, that no actual bias was discovered was immaterial as the standard to be employed was an objective one:

> The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules. Otherwise there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case. The judge's own inquiry into actual bias, then, is not one that the law can easily superintend or review, though actual bias, if disclosed, no doubt would be grounds for appropriate relief. In lieu of exclusive reliance on that personal inquiry, or on appellate review of the judge's determination respecting actual bias, the Due Process Clause has been implemented by

> objective standards that do not require proof of actual bias. [Citations.] In defining these standards the Court has asked 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."[Citation.]

(*Caperton,* at p. 2263; emphasis added.)

Code of Civil Procedure section 170.1 offers an objective due process standard, requiring a judge to recuse him or herself in particular situations when there is actual bias or the risk (or actuality) of prejudgment. Section 170.1, subdivision (b), of that code recognizes that a judge who has already tried or heard a case cannot be an unbiased and independent reviewer of his or her own rulings: "A judge before whom a proceeding was tried or heard shall be disqualified from participating in any appellate review of that proceeding." (Code Civ. Proc., § 170.1, subd. (b).) Thus, a judge who proceeded over a misdemeanor trial could not sit on the appellate panel of the Superior Court reviewing that case nor could a judge who sat as the trial court judge in a felony case sit as a member of the Court of Appeal, nor as a member of this Court. (Cal. Code of Judicial Ethics, Canon 3, subd. E(5)(f).) It would be anomalous indeed if this Court determined that due process concerns required the recusal of a judge sitting as but one member of a reviewing panel on a case in which he or she ruled, yet determined that a judge could exercise independent judgment when sitting as the sole reviewer of its earlier decision in a capital case. While the trial court in the instant case may well have intended to be unbiased when it approached the section 190.4, subdivision (e), motion, there can be no serious question that the court had prejudged the issue before it, as in fact it had imposed a death sentence for appellant just two weeks prior.

This was the risk of "actual bias or prejudgment" that the due process clause forbids. (*Caperton v. A.T. Massey Coal Co., Inc., supra,* 129 S. Ct. at p. 2263.)

Moreover, although section 170.1, subdivision (b), refers to "appellate review," at least one court has read that section to "obviously" mean that a magistrate who presided over a preliminary hearing could not then sit as the judge reviewing his or her own rulings in a section 995 motion. (*People v. DeJesus* (1995) 38 Cal.App.4th 1, 17, fn. 11 ["[T]he preliminary hearing magistrate obviously could not hear a section 995 motion. (Code Civ.Proc. § 170.1, subd. (b).)."].) The situation in the present case is analogous. The judge determined that the evidence weighed in favor of death and then reviewed its earlier decision, coming to the same conclusion. That the judge could not exercise independent review of his own earlier decision is just as obvious a fact as that a magistrate who issued a holding order after a preliminary hearing could not then be expected to decide that the evidence was insufficient to hold a defendant for trial.

Not only would it be impossible to expect any judge to independently review his or her own ruling, the appearance of a lack of impartiality due to the prior ruling offends due process and the heightened reliability demanded in a capital case. Although the United States Supreme Court in *Caperton* and this Court in *Freeman* stated that the appearance of bias was not a federal due process concern, in the context of a capital case when a single individual is making a determination between life and death, appellant submits that the heightened reliability concerns required by the Eighth Amendment apply and the appearance of bias is sufficient to offend due process when, as in the instant case, it is a judge who is deciding between life and death.

The appearance of bias is also addressed in Code of Civil Procedure section 170.1, subdivision (a)(6)(A)(iii), which mandates recusal of a judge when "[a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." Thus, in *Housing Authority of County of Monterey v. Jones* (2005) 130 Cal.App.4th 1029, the Court of Appeal held that although recusal from the appellate panel of the Superior Court of a trial judge who merely made a pre-trial ruling was not mandated by Code of Civil Procedure, section 170, subdivision (b), it *was* mandated by (a)(6)(iii) [then numbered (a)(6)(C)[38]] as an objective person would have reason to question the judge's impartiality in the matter. (*Id.* at pp. 1041-42.) Under this section, there need not be actual bias; the appearance of bias is sufficient to disqualify a judge from hearing a matter.

> In this circumstance, where a judge decided a contested pretrial matter that involved an issue related to, though not the same as, the one on appeal, it would be difficult, if not impossible, to avoid the appearance of impropriety if that judge were to participate in the appellate review. This conclusion holds true even if, as here, the particular judge involved states that she maintains the ability to decide the appeal fairly and there are no specific allegations against her of bias or prejudice.

(Id. at p. 1042.)

As this Court stated in *Freeman*, the harm to be avoided by disqualification statutes is not only the harm to a party, but also the harm to the judiciary caused by the mere appearance of bias. (*People v. Freeman, supra,* 47 Cal.4th at pp. 993, 1000-1001; see also *Peracchi v. Superior* Court (2003) 30 Cal. 4th 1245, 1251.) This need for public confidence in judicial proceedings as well as the protection of the rights of a defendant is

[38] See *People v. Chatman, supra*, 38 Cal.4th at p. 363.

never greater than in a capital case, which demands increased accuracy and reliability. (See *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Beck v. Alabama* (1980) 447 U.S. 625, pp.; *Gilmore v. Taylor* (1995) 508 U.S. 333, 342.) To any objective observer, it would be impossible for a decision-maker to claim to be able to independently review his own weighing of the evidence in a capital case. Accordingly, the appearance of bias, while not implicating due process concerns in the non-capital context, does offend due process in a capital case.

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.) Accordingly, the failure to provide appellant with an independent review of the death verdict at the trial court level not only denied appellant the right to an unbiased judge, but it also 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 denied him 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 any 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 the 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. Since then, this Court twice passed over the opportunity to definitively resolve the ambiguities in the language of section 190.4, subdivision (e). (*People v. Diaz*, *supra,* 3 Cal.4th at p. 576, fn. 34.; *People v. Horning*, *supra,* 34 Cal.4th at p. 912.) 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.

D. The Denial of Independent Review in This Case Was Prejudicial

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. Adjudication by a jurist who is not fair or impartial constitutes a structural defect in the proceedings and is reversible per se. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310; *Gomez v. United States* (1989) 490 U.S. 858, 876; *Gray v. Mississippi* (1987) 481 U.S. 648, 668.) Judge Long's ruling on the automatic motion for modification of the death verdict he imposed and the resulting death judgment cannot stand no matter how this Court might weigh the aggravating and mitigating evidence. (*Tumey v. Ohio* (1927) 273 U.S. 510, 535.)

Even if it is assumed that the federal constitutional error in this case is subject to harmless error analysis, reversal is still required unless the violation of appellant's rights was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Indeed, even if the failure to provide appellant with an independent reweighing of his penalty evidence was a matter of state law only, reversal would be required, because there is "a *reasonable possibility* such an error affected a verdict." (*People v. Jones* (2003) 29 Cal.4th 1229, 1265, fn.11, italics in original; see also *People v. Jackson* (1996) 13 Cal.4th 1164, 1232; *People v. Brown* (1988) 46 Cal.3d 432, 448.)

In appellant's case, there is at least a reasonable possibility that an independent review of the penalty phase evidence would have revealed that the judge's verdict "that the aggravating circumstances outweigh[ed] the mitigating circumstances [was] contrary to the law [and] the evidence

presented." (Pen. Code, § 190.4, subd. (e).) At the time of sentencing, the trial judge conducted a hearing, at which he purported to review the aggravating and mitigating evidence that had been the basis of his death verdict. Not surprisingly, the trial judge reviewed the evidence in precisely the same manner in which he had weighed it during the penalty phase and concluded that his original weighing process had yielded the proper verdict. (2 RTS 463-470.) Nothing else could be expected of him. This would be tantamount to asking a capital jury that had just voted to impose the death penalty to conduct a section 190.4 hearing.

Appellant was unduly prejudiced by the fact that the trial court was incapable of conducting an independent review of its own verdict and likewise incapable of finding that it had misinterpreted the law with regard to Penal Code 190.3, subsection (h), and had failed to consider relevant mitigating evidence. See Argument IV, *supra.* If appellant had received the independent review to which he was statutorily and constitutionally entitled, there is at least a reasonable possibility that the judge would have modified his verdict and not sentenced appellant to death.

//

//

VI.

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

Assuming arguendo that this Court concludes that none of the errors in this case, standing alone, requires reversal of appellant's convictions and death sentence, the cumulative effect of the errors nevertheless undermines any confidence in the integrity of the guilt and penalty phase verdicts, and warrants reversal of the judgment.

Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (See *Greer v. Miller* (1987) 483 U.S. 756, 764; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *People v. Hill* (1998) 17 Cal.4th 800, 844-845 [reversing guilt and penalty judgments in capital case for cumulative prosecutorial misconduct]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error]; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622 [errors that might not, alone, be so prejudicial as to amount to a deprivation of due process may cumulatively produce a trial that is fundamentally unfair]; *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (en banc) ["prejudice may result from the cumulative impact of multiple deficiencies"].) Indeed, where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial

against the defendant. (*United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1476.) Thus, reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying *Chapman* to totality of errors when federal constitutional errors combined with other errors].)

In this case, the combined effect of the errors resulted in a proceeding that had none of the characteristics of the adversary process that are necessary to ensure the fairness, accuracy and reliability demanded by California law and by the Sixth, Eighth and Fourteenth Amendments. The court erred in allowing appellant to waive counsel and represent himself (see Argument I), in allowing appellant to waive a jury trial on the capital charges and appropriate penalty (see Argument II), in allowing appellant to effectively plead guilty to capital murder (see Argument III), and in failing to consider the mitigating aspects of the evidence presented by the prosecution. (See Argument IV.) Moreover, appellant was denied an independent review of the death verdict, which is required by Penal Code sections 190.4, subdivision (e), and 1181, subdivision (7).

In sum, appellant was convicted of capital murder and sentenced to death without the prosecution's case ever being subjected to "the crucible of meaning adversarial testing" (*United States v. Cronic* (1984) 466 U.S. 648, 656), or to the independent review that serves as a critical check on the danger of unconstitutionally arbitrary death sentences. (See *Pulley v. Harris* (1984) 465 U.S. 37, 51-53.) A death judgment based on such a record cannot stand.

VII.

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

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

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

A. The Broad Application Of Section 190.3, Factor (A), Violated Appellant's Constitutional Rights

Penal Code Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of

circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing.

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

Appellant is aware that the Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 34 Cal.4th 382, 401.) Appellant urges the court to reconsider this holding.

B. 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 (CALJIC Nos. 8.86, 8.87). (*People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) Nothing in the record of this case suggests that Judge Long did not follow California law in this respect.

Apprendi v. New Jersey (2000) 530 U.S. 466, 478, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, *Ring v. Arizona* (2002) 530 U.S. 584, 604, and *Cunningham v. California* (2007) 549 U.S. 270, 280-282, 293, require any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. Under *Apprendi*, appellant was entitled to have a *jury* unanimously find (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and (3) that the aggravating factors were so substantial as to make death an appropriate punishment. (CALJIC No. 8.88.) Even if appellant's jury waiver was valid (which appellant contends it was not in Argument II, *supra*), *Ring*, *Apprendi* and *Blakely* required the court to make these findings beyond a reasonable doubt before it could impose the death sentence, which it did not do. (2 RTS 461-462.)

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* (2001) 25 Cal.4th 543, 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*, *Blakely*, and *Cunningham*.

Appellant further contends that the sentencer in a capital case is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This court has previously rejected appellant's claim that either the Due Process Clause or the Eighth Amendment requires that the sentencer must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair* (2005) 36 Cal.4th 686, 753.) Appellant requests that the Court reconsider this holding.

2. At a Minimum, Some Burden Of Proof Is Required by the Eighth and Fourteenth Amendments

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 appellant is therefore 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].)

This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) There is no suggestion in the record of this case that the court did not follow California law in this respect. Appellant urges the court to reconsider its decisions in *Lenart* and *Arias*.

C. The Death Penalty Determination Turns On An Impermissibly Vague And Ambiguous Standard

The question of whether to impose the death penalty upon appellant hinged on whether the court was "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (2 RTS 461.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

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

D. The Central Determination Must Be Whether Death Is The Appropriate Punishment

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) In this case, the court determined that the aggravating circumstances "warranted" death (2 RTS 461.) These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be appropriate (see *Zant v. Stephens* (1983) 462 U.S. 862, 879). By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

The Court has previously rejected this claim. (*People v. Arias*, *supra*, 13 Cal.4th at p. 171.) Appellant urges this Court to reconsider that ruling.

E. The Sentencer Should Be Required to Consider The Presumption of Life

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

F. The Use of Restrictive Adjectives In The List Of Potential Mitigating Factors Violates the Eighth and Fourteenth Amendments

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see Pen. Code, § 190.3, factors (d) and (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367, 384; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) Appellant is aware that the Court has rejected this very argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but urges reconsideration.

G. 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 either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (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 inter-case proportionality review in capital cases.

H. The California Capital Sentencing Scheme Violates The Equal Protection Clause

California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes in violation of the Equal Protection Clause. To the extent that there may be differences between capital

defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rule 4.42, (b) & (e).) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. Appellant acknowledges that the court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but he asks the court to reconsider.

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

This court has rejected numerous times the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency" (*Trop v. Dulles* (1958) 356 U.S. 86, 101). (*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 Supreme Court's decision citing international law in support of its holding 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.

VIII.

THE SENTENCE OF DEATH IMPOSED IN CONNECTION WITH APPELLANT'S CONVICTION OF SECOND DEGREE MURDER MUST BE VACATED

Count 21 of the Information charged appellant with the murder of LaTanya McCoy and further alleged that appellant has been convicted in this proceeding of more than one offense of first or second degree murder, within the meaning of Penal Code section 190.2(a)(3). (1 CT 203.) In convicting appellant, the court fixed the degree of murder as second degree and also found the special circumstance true. (2 RT 312.) The court later sentenced appellant to death on Count 21, in addition to the death sentence imposed on Count 12, the first degree murder of LeWayne Carolina committed while engaged in the commission of robbery and burglary. (2 CT 521.)

The death penalty may only be imposed where the defendant has been convicted of *first* degree murder and the fact finder has found any charged special circumstance true. (Pen. Code §§ 190.1, subdivision (a); 190.2, subdivision (a); 190.3, ¶ 1; 190.4, subdivision (a).) The penalty for second degree murder of a person other than a police officer is 15 years to life. (Pen. Code § 190, subdivision (a).)

The court therefore erred when it found true the multiple murder special circumstance attached to Count 21, and when it imposed a death sentence on that count. The legally unauthorized sentence of death must therefore be vacated.

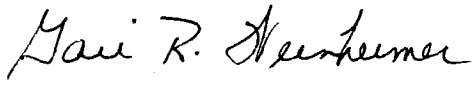
CONCLUSION

For all of the reasons stated in this brief, the judgment must be reversed.

Dated: December 23, 2011

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



GAIL R. WEINHEIMER
Senior Deputy State Public Defender

Attorneys for Appellant
DAVID SCOTT DANIELS

CERTIFICATE OF COUNSEL

(Cal. Rules of Court, Rule 8.630(b)(2))

I, Gail R. Weinheimer, am the Senior Deputy State Public Defender assigned to represent appellant David Scott Daniels in this automatic appeal. I instructed 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 the brief is 41326 words in length.

Dated: December 22, 2011

Gail R. Weinheimer

GAIL R. WEINHEIMER
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. David Scott Daniels*

Sacramento Superior Ct No.99F10432
Supreme Court No. S095868

I, JON NICHOLS, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105. 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:

Office of the Attorney General
Attn: Larenda Delaini
P.O. Box 944255
Sacramento, CA 94244-2550

Habeas Corpus Resource Center
303 Second Street, Suite 400
San Francisco, CA 94105

David Scott Daniels
P.O. Box K-90141
San Quentin, CA 94974

Each said envelope was then, on December 23, 2011, sealed and deposited in the United States mail at San Francisco, 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.

Executed on December 23, 2011, at San Francisco, California.

DECLARANT