IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. ANDREW HAMPTON MICKEL, Defendant.	)	No. S133510 [Automatic Appeal]

Tehama County Superior Court No. No. CR45115
The Honorable S. William Abel, Judge

APPELLANT'S OPENING BRIEF

LAWRENCE A. GIBBS (SBN 98866)
P.O. Box 7639
Berkeley, California 94707
Tel: (510) 525-6847
Fax: (510) 528-0228

Attorney for Defendant/Appellant
Andrew Hampton Mickel

TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF THE CASE 4

STATEMENT OF FACTS 8

Introduction 8

I. The Guilt Phase 9

II. The Penalty Phase ..... .13

III. Pretrial Proceedings 23

A. The Extradition Proceedings 23

B. Appellant's Motion To Waive Counsel And Represent Himself At Trial 25

C. The State's Declaration Of Intent To Seek Death 32

IV. Appellant's Self-Representation at Trial 33

ARGUMENT 39

ERRORS RELATED TO COMPETENCE TO STAND TRIAL

I. THE JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT VIOLATED DUE PROCESS WHEN IT FAILED TO SUSPEND CRIMINAL PROCEEDINGS AFTER RECEIVING SUBSTANTIAL EVIDENCE PRIOR TO TRIAL WHICH RAISED A DOUBT REGARDING APPELLANT'S COMPETENCE. ... 39

A. Relevant Facts 39

B. A Criminal Defendant Has A Due Process Right To Procedures Adequate To Ensure He Will Not Be Tried And Sentenced While Mentally Incompetent. 44

C. Appellant Was Denied Due Process By The Trial Court's Failure To Suspend Criminal Proceedings Under Penal Code § 1368 49

II. THE JUDGMENT MUST BE REVERSED BECAUSE APPELLANT WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY HIS ATTORNEY'S FAILURE TO INFORM THE TRIAL COURT THAT, LESS THAN TWO MONTHS BEFORE APPELLANT'S ARRAIGNMENT IN CALIFORNIA, A PSYCHIATRIST FILED A WRITTEN REPORT IN THE NEW HAMPSHIRE EXTRADITION PROCEEDINGS STATING THAT APPELLANT WAS NOT COMPETENT TO STAND TRIAL. 59

A. Summary of Argument 59

B. Relevant Facts 61

C. Mr. Reichle Rendered Constitutionally Ineffective Assistance By Failing To Provide The Trial Court With The Drukteinis' Report, Containing The Psychiatrist's Recent Opinion That Appellant Was Not Competent to Stand Trial 67

1. Defense Counsel's Failure To Provide The Trial Court With The Drukteinis Report Was Conduct That Fell Below An Objective Standard Of Reasonableness Under Prevailing Norms 68

2. Reichle's Failure To Introduce The Drukteinis Report Was Prejudicial 75

III. THE JUDGMENT OF DEATH MUST BE REVERSED BECAUSE THE TRIAL COURT VIOLATED DUE PROCESS WHEN IT FAILED TO SUSPEND CRIMINAL PROCEEDINGS AFTER RECEIVING CREDIBLE INFORMATION, PRIOR TO PRONOUNCING JUDGMENT, WHICH RAISED A DOUBT REGARDING APPELLANT'S COMPETENCE. 80

A. Summary of Argument 80

B. Relevant Facts 80

C. A Criminal Defendant Has A Due Process Right To Procedures Adequate To Ensure He Will Not Be Sentenced While Mentally Incompetent. 87

D. Prior To Pronouncing Judgment, The Trial Court Had Substantial Evidence That Raised A Doubt As To Appellant's Competency, Which Required The Court To Suspend Criminal Proceedings. 88

ISSUES RELATED TO SELF-REPRESENTATION

IV. APPELLANT'S CONVICTION MUST BE REVERSED BECAUSE, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, THE TRIAL COURT VIOLATED PENAL CODE SECTION 686.1 BY PERMITTING APPELLANT TO WAIVE COUNSEL WITHOUT ASSESSING WHETHER HE WAS COMPETENT TO CONDUCT HIS OWN TRIAL DEFENSE. .. 92

A. Summary of Argument 92

B. Relevant Facts 95

C. The Trial Court Violated State Law By Permitting Mr. Mickel To Represent Himself Without First Determining Whether He Was Competent To Conduct His Own Defense, Including Whether He Understood the Nature Of The Charges And The Applicable Defenses. 100

D. The Error, Depriving Appellant Of The Right To Counsel, Requires Reversal. 114

V. THE JUDGMENT OF DEATH MUST BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY PERMITTED APPELLANT TO WAIVE COUNSEL AT THE PENALTY PHASE IN VIOLATION OF PENAL CODE SECTION 686.1 117

A. Summary of Argument 117

B. The Trial Court Violated Penal Code section 686.1 By Permitting Appellant To Waive Counsel At The Penalty Phase. 118

1. Penal Code § 686.1 Requires Counsel At The Penalty Phase, And It Does So In Order To Ensure The Integrity Of A Death Judgment. 118

2. United States Supreme Court Decisions Permit California To Restrict The Sixth Amendment Right Of Self-Representation Where The Exercise Of That Right Compromises The Integrity Of Its Death Judgments. 119

3. The Trial Court Violated Penal Code § 686.1 By Failing To Require Counsel At The Penalty Phase. 126

C. Denial Of Counsel At The Penalty Phase Requires Reversal Of The Judgment Of Death. 126

VI. BECAUSE MR. MICKEL WAIVED HIS RIGHT TO COUNSEL, AND ELECTED TO REPRESENT HIMSELF BEFORE THE STATE HAD EVEN FILED ITS NOTICE OF INTENT TO SEEK DEATH, THE TRIAL COURT VIOLATED THE SIXTH AND FOURTEENTH AMENDMENTS BY FAILING TO OBTAIN AN UPDATED WAIVER. 127

A. Introduction 127

B. Relevant Facts 129

C. The Legal Standard For Waiver of Counsel 134

D. Appellant's Waiver Of Counsel Was Not Knowing And Intelligent Because The Record Fails To Disclose That, At The Time He Waived The Right To Counsel, Appellant Was Made Aware That The People Were Seeking The Death Penalty. 140

E. Prejudice 150

ISSUES RELATED TO THE GUILT PHASE TRIAL

VII. THE CONVICTION MUST BE REVERSED BECAUSE THE TRIAL COURT VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHT TO AN IMPARTIAL JURY BY FAILING TO ADEQUATELY VOIR DIRE JURORS WHO STATED ON THEIR QUESTIONNAIRES THAT THEY WOULD AUTOMATICALLY VOTE FOR DEATH IF A DEFENDANT WERE CONVICTED OF THE MURDER OF A POLICE OFFICER. 151

A. Summary of Argument 151

B. Relevant Facts 152

1. The Jury Questionnaire 152

2. Seated Jurors' Questionnaires 154

(a) Juror 7877 154

(b) Juror 7017 155

(c) Juror 10155 156

(d) Juror 9466 156

3. Alternate Juror Questionnaires 157

(a) Alternate Juror 12099 157

(b) Alternate Juror 9719 158

4. The Court's Voir Dire 158

C. The Trial Court Violated Appellant's Constitutional Right To An Impartial Jury By Failing to Investigate And Remove The Four Seated Jurors Who Stated Under Penalty Of Perjury That They Believed The State Should Automatically Put To Death A Defendant Who Kills A Police Officer Engaged In His Duties. 164

1. Appellant Had a Sixth and Fourteenth Amendment Right To a Trial By An Impartial Jury 164

2. A Capital Jury Is Not Impartial If It Contains Jurors Who, On The Facts Of The Case, Would Automatically Impose The Death Penalty. 165

3. The Sworn Statements Of Seated Jurors 7877, 7017, 10155 And 9466, That That They Believed The State Should Automatically Put To Death a Defendant Who Is Convicted Of Murdering a Police Officer, Required The Trial Court To Investigate And Dismiss Jurors Who Were Unable To Perform Their Duties 168

4. Because Appellant's Jury Contained Persons Who, In Violation Of *Morgan v. Illinois*, Would Automatically Vote To Execute A Defendant Convicted Of The Murder Of A Police Officer, The Judgment of Death Must Be Reversed. 177

VIII. THE TRIAL COURT DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHT TO TESTIFY IN HIS OWN DEFENSE BY PROHIBITING APPELLANT FROM PRESENTING 'HIS OWN VERSION OF THE EVENTS IN HIS OWN WORDS.' 178

A. Summary of Argument 178

B. Relevant Facts 178

C. The Trial Court's Exclusion Of Appellant's Proffered Testimony – Telling The Jury What He Did And Why He Did It – Deprived Appellant Of His Constitutional Right To Testify In His Own Defense. 190

D. The Error Was Prejudicial 197

1. The Deprivation Of A Defendant's Constitutional Right To Testify In His Defense Is Structural Error. 199

2. The Error Also Requires Reversal Under *Chapman* 202

ERRORS RELATED TO THE PENALTY PHASE

IX. BECAUSE THE CALIFORNIA CAPITAL SENTENCING SCHEME IS UNCONSTITUTIONAL IN NUMEROUS RESPECTS, MR. MICKEL'S DEATH SENTENCE MUST BE REVERSED. 208

CONCLUSION 213

APPENDIX: Reporter's Transcript of the Trial Court's Colloquy With Appellant Regarding His *Faretta* Waiver [2 RT 246-249]

Certificate Per Cal. Rules of Court, rule 8.204(c)

Proof of Service

TABLE OF AUTHORITIES

FEDERAL CASES

Agan v. Singleterry (11th Cir. 1994) 12 F.3d 1012 74

Illinois v. Allen (1970) 397 U.S. 337 121

Arnold v. United States (9th Cir.1969) 414 F.2d 1056 144

Bennett v. U.S. (7th Cir. 1969) 413 F.2d 237 139

Boag v.Raines (9th Cir. 1985) 769 F.2d 1341 90

Boykin v. Alabama (1969) 395 U.S. 238 141

Brady v. United States (1970) 397 U.S. 742 141

Brooks v. Tennessee (1972) 406 U.S. 605 185

Carnley v. Cochran (1962) 369 U.S. 506 152

Chapman v. California (1967) 386 U.S. 18 ..... passim

Drope v. Missouri (1975) 420 U.S. 162 ..... 45, 46, 92

Duncan v. Louisiana (1968) 391 U.S. 145 167

Dusky v. United States (1960) 362 U.S. 402 ..... 45. 51, 102, 149, 201, 216

Eddings v . Oklahoma (1982) 455 U.S. 104 216

Enriquez v. Procunier (5th Cir.1984) 752 F.2d 111 72

Faretta v. California (1975) 422 U.S. 806 ..... 31, 93, 101, 120, 136, 140, 145, 146, 195

Ferguson v. Georgia (1961) 365 U.S. 570 ..... 194, 195

Flanagan v. United States (1984) 465 U.S. 259 205

Ford v. Bowersox (8th Cir. 2001) 256 F.3d 783 69

Franklin v. Anderson (6th Cir. 2006) 434 F.3d 412 169

Gardner v. Florida (1977) 430 U.S. 349 122

Gideon v. Wainwright (1963) 372 U.S. 335 152

Godinez v. Moran, supra (1993) 509 U.S. 383 ..... 69, 94, 102, 103, 109

Gonzalez-Lopez (2006) 548 U.S. 140 ..... 204, 206

Gregg v. Georgia (1976) 428 U.S. 153 121

Hamilton v. Alabama, 368 U.S. 52 (1961) 152

Hicks v . Oklahoma (1980) 447 U.S. 343 216

Hughes v. United States (6th Cir. 2001) 258 F.3d 453 180

In re Oliver (1948) 333 U.S. 257 195

In *Smith v. Phillips* (1982) 455 U.S. 209 167

Indiana v. Edwards (2008) 554 U.S. 164 ..... 88, 103, 104, 118, 120, 124, 125

Iowa v. Tovar (2004) 541 U.S. 77 ..... 138, 139

Johnson v. Armontrout (8th Cir.1992) 961 F.2d 748 178

Kibert v. Peyton (4th Cir. 1967) 383 F.2d 566 69

Loe v. United States (E.D.Va.1982) 545 F. Supp. 662 69

Martinez v. Court of Appeal (2000) 528 U.S. 152 ..... 118, 120, 121

Martinez v. Ylst (9th Cir. 1991) 951 F.2d 1153 207

Maynard v. Boone (10th Cir. 2006) 468 F.3d 665 139

McKaskle v. Wiggins (1984) 465 U.S. 168 ..... 120, 203

McMurtrey v. Ryan (9th Cir. 2008) 539 F.3d 1112 89

Mempa v. Rhay (1967) 389 U.S. 128 ..... 117, 136

Moore v. United States (9th Cir.1972) 464 F.2d 663 ..... 89, 90

Morgan v. Illinois (1992) 504 U.S. 719 ... 60, 105, 177, 168, 169, 171, 181

Morris v. United States (9th Cir.1969) 414 F.2d 258 89

Palmer v. Hendricks,(3d Cir.2010) 592 F.3d 386 ..... 202, 206

Pate v. Robinson (1966) 383 U.S. 375 ..... 44, 46, 47, 74, 77, 87, 117

Pate v. Smith (6th Cir. 1981) 637 F.2d 1068 46

Patterson v. Illinois (1988) 487 U.S. 285 ..... 138, 145, 146, 147, 151

Penson v. Ohio (1988) 488 U.S. 75 115

Peters v. Kiff (1972) 407 U.S. 493 167

Rock v. Arkansas (1987) 483 U.S. 44 ..... 182, 194, 195, 197, 199, 205

Satterwhite v. Texas (1988) 486 U.S. 249 116

Schell v. United States (7th Cir.1970) 423 F.2d 101 144

Schneckloth v. Bustamonte (1973) 412 U.S. 218 139

Sell v. United States (2003) 539 U.S. 166 121

Tillery v. Eyman (9th Cir.1974) 492 F.2d 1056 90

Torres v. United States (2d Cir. 1998) 140 F.3d 392 139

United States v. Balough (9th Cir.1987) 820 F.2d 1485 ..... 139, 150

United States v. Brown (5th Cir. 1978) 569 F.2d 236 139

United States v. Butts (D.Me. 1986) 630 F. Supp. 1145 202

United States v. Carradine (6th Cir. 2010) 621 F.3d 575 139

United States v. Crawford (8th Cir. 2007) 487 F.3d 1101 116

United States v. Cronic (1984) 466 U.S. 648 ..... 33, 75, 116, 117

United States v. Dujanovic (9th Cir. 1973) 486 F.2d 182 150

United States v. Fazzini (7th Cir.1989) 871 F.2d 635 144

United States v. Fazzini (7th Cir.1989) 871 F.2d 635 144

United States v. Ferguson (9th Cir. 2009) 560 F.3d 1060 109

United States v. Garey (11th Cir. 2008) 540 F.3d 1253 139

United States v. McBride (6th Cir.2004) 362 F.3d 360 144

United States v. Moore (9th Cir. 1972) 464 F.2d 663 ..... 50, 77

United States v. Peppers (3d Cir. 2002) 302 F.3d 120 139

United States v. Taylor (7th Cir.1997) 128 F.3d 1105 ..... 202, 206

United States v. Unger (1st Cir.1990) 915 F.2d 759 144

Von Moltke v. Gillies (1948) 332 U.S. 708 ..... 139, 145

Wardius v. Oregon (1973) 412 U.S. 470 200

White v. Maryland (1963) 373 U.S. 59 152

White v. United States (9th Cir.1965) 354 F.2d 22 144

Wiggins v. Smith (2003) 539 U.S. 510 ..... 75, 77

Witherspoon v. Illinois (1968) 391 U.S. 510 146

Wright v. Estelle (5th Cir. 1978) 572 F.2d 1071 ..... 202, 205

CALIFORNIA CASES

DuBois v. Workers' Comp. Appeals Bd. (1993) 5 Cal. 4th 382.....111

Ex parte James (1952) 38 Cal. 2d 302 ..... 106, 107

In re Johnson, (1965) 62 Cal. 2d 322 31

In re Lucas (2004) 33 Cal. 4th 682 ..... 70, 115

In re Tahl (1969) 1 Cal. 3d 122 ..... 106, 141

Ex Parte James (1952) 38 Cal. 2d 302 107

In re Johnson (1965) 62 Cal. 2d 325 .....91, 95, 101, 106, 109, 114

People v. Marks (1988) 45 Cal.3d 1335 92

People v. Addison (1967) 256 Cal. App. 2d 18 106

People v. Ary (2011) 54 Cal. 4th 510 ..... 58, 90

People v. Bacigalupo (1993) 6 Cal. 4th 457 ..... 112, 214

People v. Clark (1990) 50 Cal.3d 583 ..... 94, 124

People v. Cleveland (2001) 25 Cal. 4th 466 ..... 47, 171

People v. Danielson (1992) 3 Cal. 4th 691 47

People v. Deere (1985) 41 Cal. 3d 353 48

People v. Dent (2003) 30 Cal.4th 213 ..... 93, 110, 126

People v. Durrant (1897) 116 Cal. 179 199

People v. Engelman (2002) 28 Cal. 4th 436 ..... 162, 170

People v. Fitzpatrick (1992) 2 Cal. App. 4th 1285 209

People v. Fries (1979) 24 Cal. 3d 222 187

People v. Galombos (2002) 104 Cal. App. 4th 1147 187

People v. Gutierrez (2009) 45 Cal. 4th 789 197

People v. Hale (1988) 44 Cal. 3d 531 74

People v. Harris (1987) 191 Cal. App. 3d 819 202

People v. Harris (1993) 14 Cal. App. 4th 984 74

People v. Howard (1992) 1 Cal. 4th 1132 47

People v. Huggins (2006) 38 Cal. 4th 175 45

People v. Johnson (1998) 62 Cal.App.4th 608 ..... 202, 206

People v. Jones (1991) 53 Cal. 3d 1115 ..... 47, 87

People v. Kaurish (1990) 52 Cal. 3d 648 ..... 143, 198

People v. Kellett (1969) 1 Cal. App. 3d 704 106

People v. Koontz (2002) 27 Cal. 4th 1041 ..... 47, 48, 52, 53, 123, 124, 198, 208

People v. Laudermilk (1967) 67 Cal. 2d 272 76

People v. Lawley (2002) 27 Cal. 4th 102 ..... 47, 87, 178

(People v. Leonard (2007) 40 Cal. 4th 1370 171

People v. Lewis (2008)43 Cal. 4th 415 ..... 48, 211

People v. Logan (1917) 175 Cal. 45 209

People v. Lomax (2010) 49 Cal. 4th 530 170

People v. Lopez (2008) 42 Cal. 4th 960 ..... 61, 67

People v. Merkouris,(1959) 52 Cal. 2d 672 ..... 45, 49, 88

People v. Murdoch (2011) 194 Cal. App. 4th 230 ..... 45, 56

People v. Padilla (2003) 103 Cal. App. 4th 675] 114, 209

People v. Pennington (1967) 66 Cal. 2d 508 ..... 42, 45, 47, 49, 51, 76, 78, 89

People v. Ramirez (2006) 39 Cal. 4th 398 48

People v. Robles (1970) 2 Cal. 3d 205 ..... 106, 115, 128

People v. Roldan (2005) 35 Cal. 4th 646 ..... 169, 172, 181, 216

People v. Sanders (1990) 51 Cal. 3d 471 198

People v. Schmeck (2005) 37 Cal. 3d 240 213-217

People v. Sharp (1972) 7 Cal. 3d 488 110

People v. Soojian (2010) 190 Cal. App. 4th 491 211

People v. Stankewitz (1982) 32 Cal. 3d 80 ..... 78, 208

People v. Taylor (2009) 47 Cal. 4th 850 ..... 93, 101, 103, 104, 105, 109, 120, 125, 177

People v. Tomas (1977) 74 Cal. App. 3d 75 ..... 50, 76

People v. Valentine (1946) 28 Cal. 2d 121 209

People v. Wade (1959) 53 Cal. 2d 322 87

People v. Weatherford (1945) 27 Cal. 2d 401 199

People v. Welch (1999) 20 Cal. 4th 701 ..... 49, 76, 77, 89, 168

People v. Young (2005) 34 Cal. 4th 1149 ..... 51, 58, 91

People v. Zatko (1978) 80 Cal. App. 3d 534 ..... 69, 102

Phelps v. Stostad (1997) 16 Cal. 4th 23 111

Santa Barbara Sch. Dist. v. Superior Court (1975) 13 Cal. 3d 315 112

Wotton v. Bush (1953) 41 Cal. 2d 460 111

OUT-OF-STATE CASES

Hooks v. State (Nev. 2008) 176 P.3d 1081 140

Howard v. State (Miss.1997) 701 So.2d 274 52

Hsu v. U. S.(D.C. 1978) 392 A.2d 972 140

People v. Kinder (N.Y.App. 1987) 512 N.Y.S.2d 597 69

People v. Solomon (Mich. App. 1996) 560 N.W.2d 651..... .203

People v. Whiting (Ill.App. 2006) 849 N.E.2d 125 203

Parren v. State (Md. 1987) 309 Md. 260, 523 A.2d 597 140

Quarels v. Comm. (Ky. 2004) 142 S.W.3d 73.....203

State v. Collins (Conn. 2011) 10 A.3d 1005..... 140

State v. Connor (Conn. 2009) 973 A.2d 627 109

State v. Davis (Mo. App. 1996) 934 S.W.2d 331 140

State v. DuBois (N.J. 2007) 916 A.2d 450 140

State v. Dvorak (N.D. 2000) 604 N.W.2d 445 140

State v. Fleming (Wash. 2001) 16 P.3d 610 69

State v. Flynn (Wis. App. 1994) 527 N.W.2d 343 203

State v. Glasure (Ohio App. 1999) 724 N.E.2d 1165 140

State v. Hampton (La. 2002) 818 So.2d 720 203

State v. Jason (Iowa App. 2009) 779 N.W.2d 66 109

State v. Johnson (Wis. 1986) 395 N.W.2d 176 ..... 69, 74

State v. Johnson, (Neb.App. 1996) 551 N.W.2d 742 69

State v. Lane (N.C. 2008) 669 S.E.2d 667 109

State v. Lewis (Neb. 2010) N.W.2d 834 109

State v. McNeil (N.J.Super. 2009) 963 A.2d 358; 109

State v. Rosillo (Minn. 1979) 281 N.W.2d 877 203

State v. Silva (Ha. 1995) 890 P.2d 702 203

Tachibana v. State (Ha. 1995) 900 P.2d 1293 203

STATUTES AND RULES OF COURT

Code of Civil Procedure section

section 225 .... 169, 170

Evidence Code

section 210 198

Penal Code

section 187 ..... 1, 130

section 190.2 ..... 1, 130

section 190.3 ..... 38, 129, 142, 143, 214

section 686.1 .... passim

section 1089 ..... 170, 172

section 1367 ..... 47, 50, 87

section 1368 ..... 42-56, 75-80, 87-90

MISCELLANEOUS

31 Hofstra Law Rev. 913, 1027 (2003) 147

100 Columbia Law Rev. 2030, 2102-2103 (2000) 147

1 Witkin, Cal.Crim.Law, *Elements*, § 4 (2000) 199

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. ANDREW HAMPTON MICKEL, Defendant.	No. S133510 [Automatic Appeal]

INTRODUCTION

On November 19, 2002, Red Bluff Police Officer David Mobilio was shot to death as he was refueling his patrol car. Next to the body was a copy of an American Revolutionary War flag depicting a snake, and bearing the legend, "This is a political action. Don't tread on us." Through internet postings, appellant Andrew Mickel promptly took credit for the shooting, describing his action as part of a "Declaration of Renewed American Independence." As Mr. Mickel would later explain to the jury, the shooting was an "an appropriate act in defense of liberty" and faithful to the principles of the Declaration of Independence, the Constitution, and the American Revolutionary War. He also clarified that the act was a protest against "corporate irresponsibility."

After the shooting, Mr. Mickel fled to New Hampshire. He chose that state because its constitution guarantees the "right of revolution," and because he could incorporate himself there and assert corporate immunity. His

intention was to mock the method by which corporations commit crimes in one jurisdiction and seek corporate immunity based on their incorporation in another state.

Mr. Mickel was arrested in New Hampshire. Mr. Mickel's counsel had him examined by a psychiatrist who determined, in a written report, that he was not competent to stand trial. The New Hampshire court ruled, however, that competence was not required for extradition. On January 30, 2003, Mr. Mickel was returned to Tehama County for further proceedings on the felony complaint.

Despite the recent report from the New Hampshire psychiatrist that Mr. Mickel was incompetent to stand trial, neither Mr. Mickel's counsel, nor the district attorney, nor the trial court sought to have Mr. Mickel examined to determine his competence to stand trial or waive counsel. Instead, the court granted Mr. Mickel the right to self-representation.

At the guilt phase, Mr. Mickel called no witnesses and put on no defense. At the penalty phase, Mr. Mickel offered the jury a rambling description of the principles that motivated his actions, touching on the Declaration of Independence, the Federalist Papers, the Constitution, Paul Revere's Midnight Ride, the Colonists' battles against the British Redcoats, the Shot Heard 'Round the World, the Patriot Act, the development of professional police forces and the FBI, Prohibition, the St. Valentine's Day Massacre, and his travels to Israel and the Occupied Territories. He told the jury that what he was trying to accomplish was "for you guys to get this liberty

and have this liberty." He concluded by asking the jury to "give me liberty or give me death."

This case, in short, involved an incompetent, mentally ill, defendant who was permitted through self-representation to put on no defense, to put on no mitigation, and to seek death.

The State of California has, through clear legislation, stated its overriding, independent public interest in the reliability of every death judgment it is asked to carry out. To ensure the reliability of death judgments, the State requires, to the maximum extent consistent with the Sixth Amendment, that capital defendants be represented by counsel. (Penal Code § 686.1.) Because critical evidence of Mr. Mickel's incompetence was ignored, counsel was not appointed, and no defense or mitigation was offered, the State's interest in a reliable death judgment was simply not protected here. As explained in this brief, the result was a guilt-phase trial and death judgment replete with errors of constitutional magnitude.

The judgment should be reversed.

STATEMENT OF THE CASE

On November 26, 2002, the Tehama County District Attorney filed a one-count complaint against appellant, charging him with the murder of Officer David Mobilio (Penal Code § 187), and the special circumstance of the murder of a peace officer engaged in his duties. (Penal Code § 190.2, subd. (a)(7). (1 CT 6-7.)

Mr. Mickel was arrested in New Hampshire, on December 12, 2002, and the District Attorney instituted extradition proceedings. (2 CT 431-432 [Application for Requisition]; 435-436 [Amended Felony Complaint for Extradition].) As noted above, during the extradition proceedings, a New Hampshire psychiatrist determined that Mr. Mickel was not competent to stand trial. (2d Supp. CT 79-84.)[1] The New Hampshire court determined that competency was not required for extradition, (2d Supp. CT 172-173), and therefore ordered Mr. Mickel's extradition to California.

On January 30, 2003, Mr. Mickel was arraigned on the complaint in Tehama County Superior Court. (2 RT 498.) At the arraignment, Mr. Mickel stated that he wished to represent himself. (*Id.*) Pending further proceedings, the court appointed counsel, James Reichle, to represent appellant. (2 CT 500.)

---

[1] The notation "2d Supp. CT" refers to the supplemental volume Clerk's Transcript certified by the Tehama County Superior Court clerk on June 28, 2010.

On February 3, 2003, appellant appeared with counsel, pleaded not guilty and denied the special circumstance. (3 CT 558.)

On May 21, 2003, the court conducted a preliminary examination, at the conclusion of which Mr. Mickel was held to answer on the entire complaint. (3 CT 672.) On June 9, 2003, still represented by counsel, Mr. Mickel was arraigned on a felony information containing the same charges as the complaint. (3 RT 696; 3 CT 685-686.) At Mr. Mickel's request, the time for entry of his plea was continued.

On November 20, 2003, prior to entry of his plea, appellant's counsel filed a motion to permit Mr. Mickle to represent himself. (3 CT 735-746.) Mr. Mickel filed his own brief in support of his request for self-representation. (3 CT 751-765.) On December 3, 2003, the court granted Mr. Mickel's motion to represent himself, and designated Mr. Reichle as advisory counsel. Mr. Mickel pleaded not guilty and denied the special circumstance. (3 RT 790.)

On February 9, 2004, the district attorney stated on the record that the People would seek the death penalty. (3 CT 799.)

Due to the extensive publicity surrounding the crime in Tehama County, on October 27, 2004, the court ordered that venue for the trial be changed to Colusa County. (8 CT 1837, 1841.) Jury selection began there on March 10, 2005. (4 RT 694.) Testimony at the guilt phase began on March 25, 2005. (6 RT 1347.)

Mr. Mickel gave an opening statement in which he essentially confessed

to all the facts underlying the charges of capital murder. (6 RT 1367-1369.) At the guilt phase, he called no witnesses and put on no defense. (8 RT 1833.) He gave a guilt-phase closing argument which consisted of seven sentences, lasted two minutes, and was rendered in less than one page of transcript. (10 CT 2553; 8 RT 1891-1892.) He told the jury that "with the evidence that's been put in front of you, you should find me guilty." (8 RT 1892.)

After 45 minutes of deliberation (10 RT 2553), the jury returned a verdict finding appellant guilty of first degree murder, and found the special circumstance true. (10 CT 2551-2556; RT 1900-1901.)

The penalty phase began on April 6, 2005. (9 RT 1912.) The prosecution's presentation relied on the circumstances of the crime and a substantial amount of victim-impact testimony. (9 RT 1932-2007.)

Mr. Mickel presented testimony from his mother and father describing how they learned of the killing and the circumstances of Mr. Mickel's capture. (9 RT 2024-2034.) He also presented testimony from the state's investigator in the case regarding the ability of law enforcement quickly to retrieve computerized information on automobile licenses and gun registration. (9 RT 2096.) When queried as to the relevance of this testimony, Mr. Mickel explained that it provided "moral justification" for the crime, in that if the government had such technology available during the Colonial period, it would have made it "easy to track down, say, the colonists who fired the Shot Heard 'Round the World." (9 RT 2098.) Mr. Mickel also called a security expert regarding the government's abilities to conduct surveillance of its citizens. (9

RT2100-2130.) Finally, Mr. Mickel, himself, testified, offering the jury a lengthy description of the principles that motivated his actions, touching on the Declaration of Independence, the Federalist Papers, the Constitution, Paul Revere's midnight ride, the Colonists' battles against the British Redcoats, the Shot Heard 'Round the World, the Patriot Act, the development of professional police forces and the FBI, Prohibition, the St. Valentine's Day Massacre, and his travels to Israel and the Occupied Territories. Mr. Mickel then described his planning and execution of the crime in great detail. (9 RT 2094-2095; 2174-2186.) He told the jurors that what he was trying to accomplish was "for you guys to get this liberty and have this liberty." (10 RT 2293.) He concluded by asking the jury to "give me liberty or give me death." (10 RT 2295.)

The jury deliberated a little over an hour before returning a verdict of death. (13 CT 3579.)

On April 25, 2005, the superior court denied the automatic motion to modify the sentence of death. (13 CT 3670-3673.) The judgment of death was filed on April 27, 2005. (13 CT 3674.)

STATEMENT OF FACTS

Introduction

There was no dispute at trial regarding the facts of the offense. Indeed, appellant offered to stipulate to the prosecution's entire case. (8 CT 1982-1984; 3 RT 605-608.) Thus, it was undisputed that appellant planned to ambush a police officer in Red Bluff; that he carried out that plan on November 19, 2002, by shooting Officer David Mobilio while he was refueling his patrol car; and that he fled to New Hampshire where he was ultimately arrested.

Prior to his extradition from New Hampshire, a psychiatrist had found appellant incompetent to stand trial. Appellant was nonetheless permitted to represent himself. Acting without counsel, appellant not only offered to stipulate to the underlying facts of the crime, but put on no defense and told the jury that it should find him guilty. Still representing himself at the penalty phase, appellant put on no mitigation evidence, and asked for the death penalty.

The focus of this appeal will therefore not be on the undisputed facts of the crime or the penalty phase evidence. Instead, the appeal focuses principally on numerous errors made in connection with, and resulting from, the trial court's decision to permit appellant to waive counsel and represent himself. It was a decision made in violation of state law, and in violation of various federal constitutional guarantees.

I. The Guilt Phase

In the evening of November 19, 2002, Officer David Mobilio of the Red Bluff Police Department was on patrol duty. (6 RT 1399.) He was in full uniform, and driving a marked patrol car. (6 RT 1399, 1402; see 9 CT 2271 [People's Exh. 6].)

At 1:27 a.m., Officer Mobilio radioed the dispatcher that he was stopping to refuel his car at Warner's Petroleum, a gas station on North Main Street in Red Bluff where police officers refueled their patrol cars. (6 RT 1394, 1401.) Department policy prescribed that officers were on duty when they were refueling. (6 RT 1401.) Around 1:40 a.m., the dispatcher attempted unsuccessfully to contact Officer Mobilio. (6 RT 1400.) Sergeant Ted Wiley of the Red Bluff Police Department drove to Warner's Petroleum station to check on Officer Mobilio. (6 RT 1402.)

Sergeant Wiley found Officer Mobilio laying face down, in a pool of blood, next to his patrol car. (6 RT 1403-1404.) It appeared that he had been shot several times, including in the back of the head. (6 RT 1404.) Officer Mobilio's service firearm was on the ground five feet in front of his body. (6 RT 1404.) A homemade flag had been placed near the body. The flag was a copy of a American Revolutionary War flag that depicted a snake and bore the legend, "This Is A Political Action. Don't Tread On Us." (6 RT 1405; 1407-1408; 9 CT 2325 [People's Exh. 32].) Sergeant Wiley immediately called for a medical team. (6 RT 1403.)

By the time an emergency medical team arrived, Officer Mobilio was dead. (6 RT 1414.) Medical personnel did not try to revive the officer, as there was a large bullet wound to the back of Officer Mobilio's head. (6 RT 1415.)

An autopsy revealed three bullet wounds, two in the left side of Officer Mobilio's back, and one fired into the back of his head. (6 RT 1424.) All three shots were fired from more than three to four feet away. (6 RT 1434-1436.) The gunshot to the head was the last shot fired, and it was fired while Officer Mobilio was still alive, and laying face down on the ground. (6 RT 1441-1442.) Death, which was was caused by the gunshot wounds (6 RT 1440), would have come within minutes. (6 RT 1440.) The bullets lodged in Officer Mobilio's body and were recovered during the autopsy. (6 RT 1436-1437.)

Appellant, who admitted at trial to killing Officer Mobilio, drove a maroon Mustang. Two witnesses, Joshua Schweikhard and Michael Flores, testified that, on November 18, 2002, the evening before the shooting, while in the area of Warner's Petroleum, they saw a maroon Mustang parked nearby. (7 RT 1457.) The front license plate of the Mustang was obscured by a cloth, and its occupant appeared nervous. (7 RT 1459-1460.) Right after the shooting, a truck driver saw a car similar to appellant's driving north on Interstate Highway 5. The rear license plate was covered by a cloth. (7 RT 1455.)

Later that day, appellant crashed his car on a dirt road on a ranch in Harney County, Oregon. Alice Lay and her son, Wilson Lay, lived on the

ranch. (7 RT 1575-1576; 1593-1594.) When the Lays discovered the overturned Mustang, and no persons around, they called the Harney County Sheriff. (7 RT 1577.) In the meantime, the Lays came upon appellant standing over a bonfire near the car. Alice Lay thought the weather was too warm for a fire, and asked appellant what he was burning. He said he was burning "some trash." (7 RT 1579-1580.)

Deputy Tim Alexander came to the ranch, where he met appellant who gave his name as Andrew McCrae. (7 RT 1502-1504.) Appellant produced a driver's license listing his address as 420 Sherman St., in Olympia, Washington. (7 RT 1502-1504.) Unaware of the shooting in Red Bluff, Deputy Alexander offered to give appellant a ride to a nearby town, Burns, Oregon. (7 RT 1508-1509.) Before they left, Alexander searched appellant's backpack and found a loaded .40 caliber Sig Sauer firearm. (1509-1511.) Alexander called in the serial number of the gun, which came back "clear." (7 RT 1509-1511.) Alexander took possession of the gun while they were driving to Burns. Appellant took with him only a few personal affects. He gave the wrecked Mustang with the rest of his personal effects to the Lays. (7 RT 1505.)

Once in Burns, Alexander returned the gun to appellant. (7 RT 1513-1514.) At the bus station in Burns, appellant bought a bus ticket to travel north. (7 RT 1609-1610.) He asked the ticket-seller, Carolyn Saunders, if he could bring his gun on the bus. (7 RT 1610.) When told he could not carry the gun, appellant threw it in the garbage. (7 RT 1610.) Saunders retrieved the gun and told appellant she would keep it for him. (7 RT 1611-1612.)

The gun was eventually turned over to police. (7 RT 1617-1618.) Police determined that appellant had purchased the gun, a .40 caliber Sig Sauer, model P229, from Larry's Gun shop in Olympia, Washington, in October, 2002. (6 RT 1371-1376.) Ballistic tests on the gun disclosed that it was the weapon used to fire the bullets that killed Officer Mobilio. (7 RT 1721-1726.)

On November 27, 2002, police searched appellant's apartment in Olympia, Washington.[2] (7 RT 1636.) They found materials and a template for making the flag that had been left next to Officer Mobilio's body, and a pattern for making a "brass-catcher," a device to capture ejected shell casings as a gun is fired. (7 RT 1637-1643, 1650-1651; 1727-1729; People's Exh. 6, 3 CT 680.)

Appellant's DNA was found on a wire attached to the flag. (7 RT 1676-1679, 1701-1702.) His fingerprints were found on the ammunition magazine inside the Sig Sauer gun. (7 RT 1710-1711.)

From Oregon, appellant traveled to New Hampshire. (6 RT 1368.) Following a tip from appellant's parents and a reporter appellant had contacted, appellant was arrested without incident in a hotel in Concord, New

---

[2] Though not presented to the jury in the guilt phase, an arrest warrant issued in the case indicated that shortly after the killing, appellant confessed to his parents, who lived in Ohio, that he had killed a police officer in Red Bluff. (1 CT 1A.) Appellant's parents contacted their local police (9 RT 2029), who in turn contacted authorities in California. (1 CT 1A.) The search of appellant's apartment followed.

Hampshire. (*Id.*)

II. The Penalty Phase

The prosecution's case in aggravation was based on the circumstances of the crime presented at the guilt phase, and victim-impact evidence. (9 RT 1925-1928 [prosecution penalty phase opening statement].)

As to victim-impact evidence, the prosecution presented three of Officer Mobilio's family members (his widow and both of his parents), three fellow police officers, and a student who was in a Drug Abuse Resistance Education ("DARE") program that Officer Mobilio taught at a local high school.

Linda Mobilio, the victim's widow, described meeting Officer Mobilio, their courtship, marriage and the birth of their son. (9 RT 1933-1948.) She described how she learned of his death, and how that shattered her life and the life of their son, who was 19 months old when his father died. (9 RT 1952-1953.) Officer Mobilio's parents, Richard and Laurie Mobilio, described their son's early life, his interest in law enforcement, (9 RT 1991-1996), and the effect of his death on their family (9 RT 1972-1973, 1997-1998.)

Al Shamlin, the Chief of Police of Red Bluff, described Officer Mobilio's qualities as a good and reliable police officer. (9 RT 1965-1966.) Officer Paul Nanfito, who recruited Officer Mobilio into the Red Bluff Police Department, testified to the effect of Officer Mobilio's death on Nanfito's

family, who knew him, and on the police department, which was like a second family for all its members. (9 RT 1981-1987.) Officer Brett McAllister, served with Officer Mobilio on the Red Bluff Police Department. McAllister was scheduled to work the night Officer Mobilio was killed, but had to attend to a family emergency, so Officer Mobilio filled in for him that night. McAllister had intense feelings of guilt regarding Officer Mobilio's death. (9 RT 2005-2007.)

Cate M., a 14 year old student at the local high school testified that she was in the DARE program through which she met Officer Mobilio, who was a police liaison to the program. (9 RT 1974-1975.) Cate described Officer Mobilio's wonderful qualities, and how grief-stricken the DARE students were when they learned of his death. (9 RT 1976-1979.)

Appellant stipulated to the admission of a Powerpoint slide show (People's Exh. 61-A), that was shown at the conclusion of the penalty phase. (9 RT 2000; 10 RT 2297.) The photos from the slide show appear at 10 CT 2590-2598. The slide show contained 49 photos, including photos of Officer Mobilio at the birth of his son, several photos taken at various stages of his son's life, photos of Officer Mobilio with his wife throughout their relationship, photos of Officer Mobilio with his parents and family, photos from the DARE program including photos with the students, several photos of Officer Mobilio's funeral and his grave, and a final photo of him cradling his newborn son. Superimposed on the final photo was a written tribute to Officer Mobilio and his life. (10 CT 2598.)

Appellant called five witnesses at the penalty phase: his parents, the California Department of Justice Agent who investigated the case, an expert in government surveillance, and appellant, himself.

Appellant's father, Stan Mickel, testified principally about the way he learned of his son's crime, and what he did after that. Stan Mickel told the jury that he was a professor Chinese language and literature at Wittenberg University in Springfield, Ohio. (9 RT 2024.) While he was at school on November 25, Professor Mickel received a telephone call from a family friend who was a journalist at the Washington Post. She told him that she had received a troubling telephone call from appellant, who was in Concord, New Hampshire. In the conversation, appellant referred to killing someone. (9 RT 2024-2025.) Professor Mickel dismissed his class and went online to see if he could find anything about the killing. On the Red Bluff Police Department website, he saw a photo the slain officer. (9 RT 2025.) Professor Mickel called his wife and told her to meet him at their house. When they arrived at the house, there were two letters from appellant describing what he had done. (9 RT 2025-2026.) In one letter, appellant stated that he knew "this is going to hard for you guys," but it will be easier if "you try to understand why I did it." Appellant stated that "I know we've had our differences and that I've felt trouble getting you to accept certain things about me ...." (10 CT 2622.) He closed by stating, "I'm trying to make the world a better place for everyone." (*Id.*)

Professor Mickel telephoned a hotel in Concord, where he left a message for his son. Appellant returned the call. (9 RT 2028-2029.)

Appellant told his father what he had done. Professor Mickel told his son he was going to call the police. Appellant responded that his father should "do what you have to do." (9 RT 2029.) Professor Mickel then reported the matter to the Springfield Police Department. (9 RT 2029-2030.)

Appellant's mother, Karen Mickel, testified that she works at the University of Dayton in Dayton, Ohio. She had a telephone call with her son on November 25, 2002, during which he told his mother that he had killed a police officer. Mrs. Mickel "could not believe that the man I loved, who had been raised with our values, who had a career goal of being an Outward Bound instructor ... could have done something like that." (9 RT 2032.) Mrs. Mickel told her son that they were going to have to turn him in. Professor and Mrs. Mickel agreed to this course of action to ensure their son's safety and that nobody else was harmed." (9 RT 2033-2034.) Appellant indicated that he expected to be arrested. His mother did not expect him to try to flee since he had always told his parents the truth. (9 RT 2032, 2034.)

Appellant also presented the testimony of California Department of Justice Special Agent Jeff Lierly. (9 RT 2018 et seq.) Appellant questioned Lierly about a Statement of Probable Cause that Lierly wrote to support the arrest warrant. (9 RT 2018.) The point of appellant's questioning of Lierly was not exactly clear. He asked Lierly about portions of the Statement of Probable Cause in which Lierly doubted whether appellant could have composed an email claiming responsibility for the killing and including his "Declaration of Renewed American Independence," in one 30 minute sitting at the internet café. (9 RT 2019-2021.) Appellant wanted to know why Lierly

thought it could not be done. Appellant also wanted to know how Lierly learned of the information leading to appellant's capture. Lierly explained that police in Ohio had called his office to inform them of appellant's involvement in the killing. Lierly ran computer checks on appellant, his car and a Sig Sauer handgun registered to him in Washington. (9 RT 2021-2023.) When appellant asked Lierly how the computer checks worked, the People objected. (9 RT 2098.) The court stated "I'm having trouble with relevance." (9 RT 2098.) Appellant explained his theory of relevance:

> "Well, as I said under 190.3(f), I have a right to present evidence that demonstrates that I reasonably believed were moral justifications for the charges. And if, as I was stating before, if the government technology makes it available to quickly track down and find someone simply by knowing their car and their state license plate number and what kind of caliber handgun they had registered to them, the government had that capability, then they would make it easy to track down, say, the colonists who fired the Shot Hear 'Round the World. So if the government has these capabilities, then it would make the government more capable of denying and infringing liberties."

(9 RT 2098.) Appellant asked nothing further of Lierly.

Appellant also presented the testimony of Robert McWilliams, an expert in government surveillance. (9 RT 2099.) Appellant was again queried about the relevance, which he explained as follows:

> "As I said, the powers and capabilities that the government has in order to -- that would make it capable of attacking liberties is a significant consideration, and the degree to which those liberties are threatened. So his testimony about government capabilities and government control is going to go to how powerful the government is and how powerful the threat to

> liberty that the government makes is, how powerful that threat is. If the threat, as I said, if King George Red Coats over, but they had no guns and no swords and no horses, then who cares? It would not be justified to shoot a Red Coat if they had no guns and no horses and no swords. But if they had a satellite technology, if they can track down colonists with DNA evidence, if they can link the colonists to specific crime scenes, then that makes the British government a significant threat to liberty, as opposed to if they did not have those capabilities. Now, if our government does have significant capabilities that makes it a threat to liberty -- well, let me say, if our government did not have those capabilities, and if our government was no threat to liberty, then it wouldn't be justified or extenuating for me to take my action. But if our government is a threat to liberty and has the powers to be a threat to liberty, then that would serve to extenuate the circumstances.

(9 RT 2105.)

The trial court permitted McWilliams to testify regarding information-gathering technology. (9 RT 2108.) McWilliams testified to the existence of various databases used by law enforcement to collect, store and search for information about citizens and other persons in the country. (9 RT 2109-2123.) McWilliams asserted that there was a possibility of any of these systems being "abused." (9 RT 2126.) McWilliams acknowledged, however, that the data collection systems are useful for lawful purposes, including catching criminals, ensuring that criminals do not buy guns, and tracking sex offenders and terrorists. (9 RT 2128-2129.)

Appellant, himself, testified at great length, (9 RT 2050-2096, 2131-2157; 10 RT 2167-2209), "to explain why [he] felt like attacking and killing

someone was an appropriate act in "defense of liberty." (9 RT 2050.) Appellant's rambling monologue, explaining his defense of liberty touched on the Declaration of Independence (9 RT 2051-2052); the Constitution, particularly the Preamble (9 RT 2053); the Shot Heard 'Round the World (9 RT 2055-2056); Paul Revere's Midnight Ride (9 RT 2056-2057); the Battle of Lexington (9 RT 2057); the Federalist Papers (9 RT 2058); his experience training to be a Ranger in the United States Army (9 RT 2060-2065); his reaction to the destruction of the World Trade Center on 9/11 (9 RT 2065-2066); the Israeli-Palestinian conflict (9 RT 2066-2070); the passage of the Patriot Act (2070-2074); gun control legislation (9 RT 2074-2076); the government's technological capabilities for surveillance of its citizens (9 2088-2091); the development of a professional police force (9 2092-2094); the government's attack on our liberties through hostility to religion and the war on drugs (9 RT 2132-2137); Prohibition and the St. Valentine's Day Massacre (9 RT 2138-2140); and the erosion of personal responsibility by corporations (9 RT 2141-2145).

Appellant explained that he had tried to solve the problems created by the erosion of personal liberties through peaceful protest, but had been unsuccessful. (9 RT 2077-2080.) Appellant therefore determined that he had to "bear arms in defense of freedom." (10 RT 2171.) Appellant explained that "if you look at the Shot Heard 'Round The World where the colonists came forward to defend themselves, when your government goes on the offensive against your liberties, you have the right to go on the offense to protect those liberties. So I decided that it was justified for me to go on the

offensive to protect these liberties." (10 RT 2171-2172.)

Based on his training as an Army Ranger, appellant decided to ambush a police officer. (10 RT 2172-2174.) He chose to commit the crime in California, rather than in his home-state, because that would "be interpreted as simply a local feud. But this is a national problem." (10 RT 2174.) He settled on California because "it's the least gun-friendly state in the Union, and it's where the war on drugs is fought the hardest, which, as I said before with Al Capone and whatnot, when you fight the war on drugs harder, all that does is it ... gives the gangs more money to fight over because they're fighting over drug money. And so it's not only a danger to liberty for the people who want to practice those liberties, but it's also a danger to their safety because then the gangs are stronger." (10 RT 2174.) Appellant decided on Redding or Red Bluff, and ultimately chose Red Bluff. He located Warner's Petroleum station where police officers refueled their patrol cars. He went there on November 17, 2002, and waited, but then wondered, "am I right about these beliefs that I have? Should I actually do this? Is this something that should really be done?" (10 RT 2177.) Unsure of what to do, appellant left the area and drove north to a rest-stop, and where he decided it was in fact the right thing to do. He then returned to Warner's Petroleum the next night, where he ambushed Officer Mobilio. (10 RT 2177-2178.) Appellant then recounted traveling north, wrecking his car in Oregon, posting internet messages taking credit for the killing, traveling to New Hampshire, and his ultimate arrest in the hotel in Concord. (RT 2178-2186.)

On cross-examination, appellant conceded that the did not know Officer Mobilio, but killed him because he was "an offender of liberty." (10 RT 2207.) Appellant stated that "I do feel that what I did was right and I am extremely sorry for what I have done to Officer Mobilio's family, but I am not sorry for what I did him specifically. I am sorry for the repercussions that that has had on other people, but I would not change what I have done." (10 RT 2208.)

In closing argument, the People asked for the death penalty based on circumstances of the murder and impact it had on Officer Mobilio's family, friends, and fellow officers. (10 RT 2271.)

In his closing argument, appellant continued in the same vein as his penalty phase testimony, discussing the erosion of rights in America. He then told the jury that it should feel free to return a verdict of death:

> Now, what I want out of this trial. There is no verdict you could give me, I don't have any verdict that is a goal of mine in this trial. Life without the possibility parole and the death penalty are equally worthless to me. They are both the same.
>
> Now -- and if my death is the only comfort that Officer Mobilio's family and friends can take out of this situation, then maybe you should go ahead and do that. If -- I have an unpayable burden, an unpayable debt that I have forced upon these people and if the only thing that I can do to give them any sense of comfort is to die then maybe you guys should simply go ahead and do that and make that decision.
>
> But what I want out of this, what I am trying to accomplish here is I want for you guys to get this liberty and to have this liberty. I want for you to -- I want for you guys to get your

> liberties back. I want for you to take away from the government the ability to define and decide for itself what your liberties are.

(10 RT 2293.)

He concluded:

> The prosecution is seeking the death penalty in this case, and that is fine, because I ask you give me liberty. Give yourselves liberty. Give us all liberty or give me death.

(10 RT 2295.)

The jury promptly returned a verdict of death. (10 RT 2300.)

III. Pretrial Proceedings

A. The Extradition Proceedings

As described above, immediately after the shooting, appellant traveled to New Hampshire, where he was arrested on November 26, 2002. (2d Supp. CT 129.) On December 12, 2002, the District Attorney of Tehama County applied to the Governor of California an for extradition to return appellant to California for trial. (2 CT 431.) On December 18, 2002, the Governor of California formally requested appellant's extradition from New Hampshire. (2d Supp. CT 64.)

On January 8, 2003, Mr. Mickel's New Hampshire counsel, Mark L. Sisti, filed a petition for writ of habeas corpus in the New Hampshire Superior Court alleging as a defense to the extradition proceedings that Mr. Mickel was not competent to stand trial. (2d Supp. CT 60-84.) According to Mr. Sisti's habeas petition, "upon initial consultation, [Sisti] had immediate concerns regarding the Petitioner's ability to communicate with, and adequately assist counsel. In addition, Counsel was concerned regarding Mr. McCrae's[3] lack of ability to understand the proceedings against him as well as the roles of those involved in those proceedings." (2d Supp. CT 60.) Mr. Sisti therefore "requested that a psychiatrist, A.M. Drukteinis, M.D., J.D., conduct a

---

[3] Appellant used an alias, Andrew McCrae. (1 RT 22.) He adopted that name in order to protect his family from being associated with his crime. (10 RT 2171.) The name "McCrae" came from the novel, *Lonesome Dove,* which contained a character, Augustus McCrae, whom appellant thought was "really cool." (*Id.*)

preliminary psychiatric/competency evaluation on the Petitioner." (2d Supp. CT 62.)

Petitioner's New Hampshire habeas petition was supported by Dr. Drukteinis' report. That six-page report, dated December 17, 2002, was Attachment C to the habeas petition, and appears at 2d Supp. CT 79-84.

Dr. Drukteinis stated in his report that he interviewed Mr. Mickel for two hours; conducted a mental status examination and a preliminary competency to stand trial assessment; reviewed Mr. Mickel's writing entitled "The Declaration of a Renewed American Independence"; and had a "lengthy telephone conversation with [Mr. Mickel's] mother." Based on this investigation, Dr. Drukteinis opined that Mr. Mickel had "a history of Depressive Disorder and was likely suffering from a Delusional Disorder." (2d Supp. CT 84.) Dr. Drukteinis noted that Mr. Mickel "plans to plead not guilty because he had a good reason to do what he did, i.e., justifiable homicide." (2d Supp. CT 83.) Dr. Drukteinis stated that additional testing would be necessary to complete a "full independent psychiatric evaluation." (2d Supp. CT 79.) Nonetheless, on the basis of his investigation and testing of Mr. Mickel, Dr. Drukteinis rendered the following opinion:

> "In my opinion, Mr. McCrae's competency to stand trial, or to rationally participate in other court proceedings, is highly questionable because of his irrational thinking. Most prominently, he would refuse a plea of insanity because he lacks the insight into his mental disturbance. This, of course,

> could remove any reasonable defense for him, since his trial cannot be based on his delusional aim at revolution."

(2d Supp. CT 84.)

The New Hampshire court denied the habeas petition on the ground that competence was not required for extradition. (2d Supp. CT 172-173.) The court also noted that Mr. Mickel "is capable of communicating with this attorney and understands the nature of the extradition proceedings." (2d Supp. CT 175.) The court based this conclusion on two facts: first, that Dr. Drukteinis reported that Mr. Mickel "calmly and methodically gave his account (of the murder) without any signs of psychotic disorganization of thought"; and second, that Mr. Mickel told Drukteinis that he "plans to plead not guilty because he had good reason to do what he did, i.e., justifiable homicide." Based on these facts, and without any hearing on Mr. Mickel's competency, the New Hampshire court concluded that Mr. Mickel was "capable of discussing the facts that he is facing criminal charges arising out of the events in California." (2d Supp. CT 175.)

Mr. Mickel was then extradited to California.

B. Appellant's Motion To Waive Counsel And Represent Himself At Trial

Following his extradition, Mr. Mickel first appeared in Tehama County Superior Court on January 30, 2003. (2 CT 498; 1 RT 5-7.) At that hearing,

Mr. Mickel asked the court "to recognize my right to represent myself...." (1 RT 6.) The court put the matter over for further arraignment and appointment of counsel. (*Id.*)

The next hearing took place on February 4, 2003. Mr. Reichle was present, ostensibly to receive the appointment as counsel. The first words out of his mouth, however, were:

> "Yes, sir, James Reichle, tentatively appointed supporting the defendant's request to represent himself, with co-counsel."

(1 RT 9.)

The court then asked Mr. Mickel if he wished to press his motion to represent himself. (1 RT 9.) After colloquy with the court during which the court observed that Mr. Mickel "did not demonstrate a very sophisticated or, for that matter, any grasp of the law," Mr. Mickel agreed to permit Mr. Reichle to represent him through the preliminary hearing. (1 RT 14.)

Although Reichle was "supporting" Mr. Mickel's request for self-representation, Reichle did not advise the court of Dr. Drukteinis's recent opinion questioning Mr. Mickel's competency. At that point, there was no evidence in the record that Reichle was aware of the Drukteinis report. However, it became clear during pretrial proceedings in April of 2003 that that Reichle actually possessed the Drukteinis report. This was because Reichle specifically asked the court to seal various documents to prevent their

public disclosure, including the New Hampshire habeas petition and the Drukteinis report. (3 CT 643B-C.)

While the suppressed psychiatric report did not seem to give the trial court cause for concern, other developments in the case did. Thus, on April 7, 2003, Mr. Reichle filed a "Motion Re Participation In the Proceedings," (3 CT 561-565), in which he asked the court to permit Mr. Mickel to "personally address the Court in order to explain the legal basis and nature of his affirmative defense." (3 CT 562.) While Mr. Reichle did not elaborate on the "legal basis and nature of the affirmative defense" Mr. Mickel intended to present to the court, both the court and the parties were well aware of it. This is because the record prior to Mr. Reichle's April 7, 2003 motion was replete with appellant's own description of the crime and his stated legal justification for it. Thus, the court was aware that Officer David Mobilio had been fatally shot multiple times, including one bullet to the back of the head at close range, while refueling his patrol car in the early morning hours of November 19, 2002. The court was also aware that a flag modeled on an American Revolutionary War flag and bearing the legend "this Is A Political Statement, Don't Tread On Us," was left next to the body (1 CT 1A [Statement of Probable Cause].) The court also knew that appellant publicly admitted in internet postings that he committed the killing, explaining the following:

> "Hello Everyone, my name's Andy. I killed a Police Officer in Red Bluff, California in a motion to bring attention to, and halt the police-state tactics that have come to be used throughout our country. Now I'm coming forward to explain that this

killing was also an action against corporate irresponsibility."

(1 CT 1A; 1 CT 42-46 [full text of appellant's internet posting entitled "Proud and Insolent Youth Incorporated,"]; 47-81.)

Finally, the court was aware that Mr. Mickel premised his defense to the charges of capital murder on the "Right of Revolution" contained in the New Hampshire Constitution, despite the fact that this was a California crime. (1 CT 45.) Mr. Mickel quoted that right of revolution in the internet posting in which he took credit for the murder:

> "Government being instituted for the common benefit, protection, and security of the whole community, and not for the private interest or emolument of any one man, family, or class of men; therefore, whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought to reform the old, or establish a new government. The doctrine of nonresistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind. "

(1 CT 45.)

Appellant was arraigned on February 25, 2003. After reviewing the complaint, the court asked Mr. Mickel what his plea would be. Mr. Mickel responded:

> "Your Honor, I admit that I committed the act that resulted in Officer Mobilio's death. However, in order to gain the

> opportunity to represent to a jury that this was a valid, justified action, I plead not guilty."

(1 RT 23.)

On April 22, 2003, the trial court conducted a hearing on appellant's motion to address the court at the preliminary hearing to explain his affirmative defense. (1 RT 55 et seq.) Reichle told the court that appellant "admitted doing the act, and he believes he has a defensive justification, and simply what he wants to do is describe to the Court what that justification is." (1 RT 57.) Concerned with pretrial publicity, the court asked Reichle "what could be more prejudicial to the Defendant than my allowing him to stand up and make a half-hour statement in which he sets forth his philosophical or legal justification for killing a police officer?" (1 RT 59.) Reichle responded that what appellant wanted to put forward was "a theory of law and Constitutional law ...." (1 RT 60-61.) Reichle candidly conceded that

> "[t]here is obviously no case or no jury instruction for a justification in this case. But I think it is a legitimate inference from the Constitution as to what he is claiming, whether you agree or not." (1 RT 62.)

While the court was prepared to permit Mr. Mickel to testify at the preliminary hearing, the court denied the motion to permit Mr. Mickel to explain his affirmative defense at the preliminary hearing in a way that would give him a "soap box, to stand up and state ... that which he believes to be the facts of the case." (1 RT 66.) The court's concerns could only have been

compounded when, at the same hearing, Reichle moved to seal materials from the New Hampshire proceedings, including a psychiatric report that Reichle called "inflammatory" (3 CT 643B-C; 1 RT 68.)

The preliminary examination was held on May 21, 2003, after which Mr. Mickel was held to answer. (3 CT 672; 1 RT 221-222.)

After being held to answer, Mr. Mickel renewed his motion for self-representation. On November 24, 2003, Mr. Mickel filed a brief in support of his motion. (3 CT 751-765.) Though coherently written, the brief hinted at Mr. Mickel's complete lack of understanding of the charged crime and the potential defenses, and at his major mental illness. Thus, Mr. Mickel argued that he should be assisted by advisory counsel for the following reason:

> "In this case the prosecution's case is relatively simply [sic] and straightforward, especially with Defendant willing to admit the bulk of, if not all of, the facts that the prosecution intends to present. Whereas, the defense's case is an affirmative one and extremely complex. Furthermore, it is anticipated that with the theoretical overview of *the defense being alien to the District Attorney*, the prosecution will challenge very nearly all the evidence that Defendant intends to present, to a greater extent and diligence than the average defense would undergo. Indeed, the theories and evidence of the defense are quite sensitive in the manner in which they can be misportrayed as to relevance at trial."

(3 CT 760 [emphasis added].)

For his part, on November 20, 2003, Mr. Reichle filed a brief in support of appellant's motion for self-representation. (3 CT 738-746.) Mr. Reichle also hinted at the bizarre nature of the defense Mr. Mickel intended to offer:

> "The Defendant has publicly admitted committing the acts that underlie the charged murder of a law enforcement officer, while articulating the justification and necessity of the acts in the nature of an affirmative defense. The focus of this case is that defense. Defendant has determined, after careful deliberation, that he can adequately present his case to the jury only if he himself controls and conducts that presentation."

(3 RT 740.)

The trial court heard Mr. Mickel's motion for self-representation on December 8, 2003. (2 RT 245 et seq.) The court questioned Mr. Mickel on the acknowledgments he made on the *Faretta* waiver form. However, the court did not question Mr. Mickel to determine whether he understood the charges, the elements or the defenses to such charges, as this court had required in cases decided prior to *Faretta v. California* (1975) 422 U.S. 806. (See *In re Johnson*, (1965) 62 Cal.2d 322, 335.)

The court determined that appellant's waiver was knowing and intelligent, as required by *Faretta*, and granted the motion for self-representation. As the court explained,

"The Court at this time recognizes the Defendant's right under

> *Faretta* to represent himself. Whether or not the Court believes that is a wise or an appropriate decision, it appears to the Court that the Defendant's waiver to right of counsel is knowing, intelligent, express and explicit, and that therefore he is entitled to make that decision. The Court will at this time permit the Defendant to represent himself."

(2 RT 254.)

At the conclusion of the hearing, Mr. Mickel, then representing himself, entered a plea of not guilty and denied the special circumstance. (2 RT 258.)

C. The State's Declaration Of Intent To Seek Death.

At the next hearing on February 9, 2004, after Mr. Mickel had succeeded in waiving the right to counsel – the prosecution announced for the first time on the record that "this will be a death penalty case." (2 RT 261.) The prosecutor stated that he had "let Mr. Reichle know that before. But I am just stating for the record that it will be my intention to seek death in this matter." (*Id.*)

Mr. Mickel had stated his intention to waive counsel at his first appearance on January 30, 2003. There were ten hearings in the ten months between that hearing and the hearing on December 8, 2003 when the court granted Mr. Mickel's motion for self-representation. During that 10 month

period, the prosecution did not provide the statutory notice that it intended to seek death. As noted, Mr. Mickel was granted self-representation on December 8, 2003. In the very next court proceeding -- after Mr. Mickel had elected to represent himself -- the prosecution informed the court and the defendant that this would in fact be a death case. At this point, Mr. Mickel had already waived his right to counsel. And although the case was now a death case, the trial court did not question Mr. Mickel further on whether he wished to continue to represent himself.

IV. Appellant's Self-Representation at Trial

It is difficult to characterize appellant's self-representation at trial as subjecting the prosecution case to "the crucible of meaningful adversarial testing." (*United States v. Cronic* (1984) 466 U.S. 648, 656.)

During jury selection, appellant permitted permitted three jurors who indicated they would automatically vote for death in a case involving the shooting of a police officer, to sit on the jury. Prior to selecting the jurors who would decide the case, the trial court had potential jurors fill out a questionnaire. (8 CT 1954-1978.) One question asked jurors if they believed that the State should automatically put to death any defendant convicted of killing a police officer who was engaged in the performance of his duties – the precise question the jury would have to decide in appellant's case. (8 CT

1966-1968.) Three jurors who were eventually seated, and one alternate, answered that they believed such a defendant who committed such a crime should automatically be put to death. (37 CT 10721 [Juror 7877]; 38 CT 10940 [Juror 7017]; 38 CT 11079 [Juror 10155] .)

Appellant put on no defense at the guilt phase, and indeed essentially confessed to the charges. In his opening statement, appellant himself fully described for the jury how he he had ambushed and killed Officer Mobilio. Appellant told the jury the following:

> Now, I can agree with most all of the facts that the Prosecution is going to present to you. I can agree that most everything ... that they're going to tell you are [sic] absolutely true.
>
> First of all, I want to tell you that I did it. I did ambush and kill Officer David Mobilio. I am not denying it. I have never denied it. I came forward to the public to take responsibility and admit that I was the one who did it, and the evidence will show that I came forward to take responsibility. I came forward. And then at every point in time I have always taken responsibility for being the one who took Officer Mobilio's life. And then I have never hid that from anyone, and I have never lied about that to anyone. And I'm going to testify during the trial, and I'll tell you all of that under oath.
>
> I want to tell you now, though, that the majority of all the facts that the Prosecution is going to present to you are true. They're real, the majority of them.
>
> They are going to get some small things wrong because they weren't there when it happened, and they'll have the wrong interpretations for a lot of the facts. But I can't think of any significant facts they are going to present to you that I am not willing to admit and agree right now are true. I can already tell

you that I admit that the facts that they are going to present to you are pretty much what happened.

Now, the evidence in this case will certainly and truthfully show the following things. On the 19th of November in 2002 at about 1:30 in the morning at Warner's Petroleum in Red Bluff, California, I ambushed and shot Officer Dave Mobilio. At the scene I left that canvas flag with the rattlesnake on it, the one that says, "Don't tread on us," I left that there. I bought that handgun several weeks before, and I used that gun on November 19th. After the shooting I drove my car northeast out of California to Oregon. And I wrecked on the White Horse Ranch Road in Harney County. And after I wrecked my car, I was helped by Deputy Tim Alexander, and he drove me to Burns, Oregon.

I tossed my gun in a trash can at a bus stop there in Burns, and a lady working there took it, and she said she would keep it for me, because she didn't know what was going on. But she said she would keep the gun for me. And then later she gave it to Special Agent Jeff Lierly of the California Department of Justice.

And then I took all those bus trips from Burns to Portland, and then between Portland and Olympia, and then up to Seattle, and then I flew from Seattle to the East Coast, and I went to New Hampshire. And while I was in New Hampshire, I contacted the media to identify myself and explain my actions. And the day after I came forward to the media I was arrested in my hotel room.

Now, most of the facts that the Prosecution is going to present to you are right, but they aren't going to present them to you with the right interpretation. The Prosecution's view of what I did is very different from what really happened and why.

They're going to tell you some very negative things about me. But the truth is that they don't actually know me, and they won't have the right interpretation for what really happened. They have the facts right, but the presentation is going to be wrong. But how the system works is that they can take the facts that exist and use those to present to you what they believe.

> Now, I know, I know that it's hard to swallow that there can be any defense to killing another human being. I know that. It's a very serious thing, and you should take none of these issues lightly. I just ask that you wait and listen to what I have to say when I present my case.

(6 RT 1366-1369.) Appellant thus essentially confessed in open court to the charges of special circumstance murder.

Of the 26 witnesses called by the prosecution at the guilt phase, appellant conducted no cross-examination of 17. His cross-examination of the remaining nine prosecution witnesses was perfunctory. (E.g., 6 RT 1416 [Domenic Catoma]; 6 RT 1446-1449 [Thomas Resk]; 7 RT 1601 [Wilson Lay]; 7 RT 1679-1680 [Tanya Vermuelen].)

Appellant did not submit any jury instructions. (8 RT 1815.) Appellant did, however, object to the court instructing the jury on lesser-included offenses. (8 RT 1793-1797.) Appellant told the court that "if I did not take Officer Mobilio's life for the right reasons, then – and the jury believes that I did not do so for the right reasons, then I should be convicted of first degree murder ... I still feel in terms of personal responsibility that there is no lesser-included offense that is reasonable considering what I did." (8 RT 1795.) The trial court told appellant that it was "concerned that you appreciate the magnitude of what you are doing." (8 RT 1796.) After ascertaining that appellant had discussed the matter with his advisory counsel, that he was not under the influence of any medication, and had not been threatened to make the decision to forego the lesser-offense instructions (8 RT 1796-1797), the court acceded to Mr. Mickel's wishes that no such

instructions be given. (8 RT 1797.)

Appellant's closing argument covered approximately one page of transcript. (10 RT 1891-1892.) He told the jury that it should find him guilty:

> "I would say that with the evidence that's been put in front of you ... you'd have to be fools to find me innocent. I would find me guilty if I were a juror in this case. Now, I've taken responsibility for taking Officer Mobilio's life every step of the way. And I have always accepted the possibility every step of the way that I would be found guilty. And with the evidence that's been put in front of you, you should find me guilty."

(*Id.*)

After 45 minutes of deliberation (10 RT 2553), the jury returned a verdict finding appellant guilty of first degree murder, and found the special circumstance true. (10 CT 2551-2556; RT 1900-1901.)

Appellant's self-representation at the penalty phase was, if anything, more curious. As noted above, appellant called both his parents to testify, but not as to his childhood or his mental illness or about the impact of their son's execution on them, but rather only as to how they learned of their son's crime and his arrest. (9 RT 2024-2034.) Appellant also called the state's investigator to describe how he was able to use a database to trace appellant from the serial number on the gun and his vehicle license. (9 RT 2018 et seq.) This witness was followed by expert in government surveillance who testified about the extensive databases the government maintains. (9 RT 2099 et seq.) Appellant, himself, testified to his reasons for killing Officer Mobilio, based

on American Revolutionary War principles.

Appellant thus presented no mitigating evidence, as that term is defined by the Penal Code section 190.3. It was therefore hardly surprising when, in his closing argument, appellant asked the jury to "give us all liberty or give me death." (10 RT 2295.)

ISSUES RELATED TO COMPETENCE TO STAND TRIAL

I. THE JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT VIOLATED DUE PROCESS WHEN IT FAILED TO SUSPEND CRIMINAL PROCEEDINGS AFTER RECEIVING, PRIOR TO TRIAL, SUBSTANTIAL EVIDENCE WHICH RAISED A DOUBT REGARDING APPELLANT'S COMPETENCE.

A. Relevant Facts

After shooting Officer Mobilio, appellant fled to New Hampshire, where he was arrested on November 26, 2002. (2d Supp. CT 129.) On December 18, 2002, the Governor of California formally requested appellant's extradition from New Hampshire. (2d Supp. CT 64.) On January 8, 2003, Mr. Mickel's New Hampshire counsel, Mark L. Sisti, filed a petition for writ of habeas corpus in the New Hampshire Superior Court alleging as a defense to the extradition proceedings that Mr. Mickel was incompetent to stand trial. (2d Supp. CT 60-84.) According to Mr. Sisti's habeas petition, "upon initial consultation, [Sisti] had immediate concerns regarding the Petitioner's ability to communicate with, and adequately assist counsel. In addition, Counsel was concerned regarding Mr. McCrae's lack of ability to understand the proceedings against him as well as the roles of those involved in those proceedings." (2d Supp. CT 60.) Mr. Sisti therefore "requested that Dr. A.M. Drukteinis, M.D., J.D., conduct a preliminary psychiatric/competency evaluation on the Petitioner." (2d Supp. CT 62.) The New Hampshire habeas

petition was supported by Dr. Drukteinis' six-page report, dated December 17, 2002. (2d Supp. CT 79-84.)

As described above, Dr. Drukteinis concluded that appellant had "a history of Depressive Disorder and was likely suffering from a Delusional Disorder." (2d Supp. CT 84.) Dr. Drukteinis stated that additional testing would be necessary to complete a "full independent psychiatric evaluation." (2d Supp. CT 79.) Nonetheless, on the basis of his investigation and testing of appellant, Dr. Drukteinis opined that "Mr. McCrae's competency to stand trial, or to rationally participate in other court proceedings, is highly questionable because of his irrational thinking." (2d Supp. CT 84.)

The New Hampshire court denied the habeas petition on the ground that competence was not required for extradition. (2d Supp. CT 172-173.) The court also noted that, in view of Mr. Mickel's ability to "[give] his account [of the murder] without any signs of psychotic disorganization of thought," and Mr. Mickel's claim that that he "plans to plead not guilty because he had good reason to do what he did, i.e., justifiable homicide," Mr. Mickel was "capable of discussing the facts that he is facing criminal charges arising out of the events in California." (2d Supp. CT 175.) Despite Dr. Drukteinis opinion, the New Hampshire court did not conduct any hearing into appellant's competence.

Appellant was then extradited to California, where he first appeared in

Tehama County Superior Court on January 30, 2003. (2 CT 498; 1 RT 5-7.) Mr. Reichle was appointed to represent appellant, and did so until the trial court accepted Mr. Mickel's waiver of counsel ten months later, on December 8, 2003. Reichle was present at appellant's first appearance on February 4, 2003, at which Reichle declared that he was "tentatively appointed supporting the defendant's request to represent himself, with co-counsel." (1 RT 9.) While "supporting" Mr. Mickel's request for self-representation, Reichle did not advise the court of Dr. Drukteinis's recent opinion questioning Mr. Mickel's competency.

On April 25, 2003, while he was still representing appellant, Reichle filed a motion in the trial court to prevent the public disclosure of eight categories of evidence including, "any mention of the extradition proceedings in New Hampshire or any information presented therein, including the contents or sealing of the Drukteinis report as to much of which Defendant asserts it was divulged in violation of his attorney-client and psychotherapist privileges." (3 CT 643B-C.)

On April 22, 2003, the court and the parties discussed Reichle's request to prevent disclosure of this evidence. (1 RT 66 et seq.) Reichle told the court that in New Hampshire "a lot of people were interviewed, and a lot of material was provided, some of which could be significantly inflammatory." (1 RT 68.) Reichle indicated that the material he was seeking to seal had been obtained from the prosecution in discovery. (1 RT 68.) Reichle nonetheless stated that

"because of the nature of the request I am making, I cannot articulate for the Court at this time what the nature of those items are." (1 RT 68-70.)

Of course, had Reichle informed the court of "the nature of those items" from the New Hampshire proceeding, including the Drukteinis report questioning appellant's competence, he would have had no basis for his unqualified "support" for appellant's motion for self-representation. Confronted with a psychiatric report questioning a defendant's competence, as did the Drukteinis report, the trial court would have been obligated to suspend the proceedings pursuant to Penal Code section 1368 prior to permitting appellant to represent himself. (See *People v. Pennington* (1967) 66 Cal.2d 508, 519, *discussed infra.*) Reichle did not reveal the contents of the Drukteinis report to the trial court. In light of the People's statement that they did not intend to use the New Hampshire documents, the court denied the Reichle's motion without prejudice. (1 RT 83.)

Despite Reichle's best efforts to keep the Drukteinis report from the court, his efforts were ultimately unsuccessful. That was because appellant, himself, informed the court of the gist of the Drukteinis report. Thus, on July 7, 2004, appellant told the court in his motion for change of venue that after he was arrested in New Hampshire, "attorney Sisti, without Defendant's consent and against his express instructions, attempted to lay a foundation for an insanity defense, making dramatic, unsubstantiated claims that the Defendant could not even identify himself, could not understand the court proceedings,

and could not understand the difference between the Judge, the Prosecution, and the Defense." (4 CT 864-865.)

To review, as of July 7, 2004, the trial court was aware that appellant had been examined by a psychologist or a psychiatrist in connection with the New Hampshire proceedings, and that based on the report of such mental health expert, appellant's New Hampshire attorney had informed the court that appellant "could not even identify himself, could not understand the court proceedings, and could not understand the difference between the Judge, the Prosecution, and the Defense." This psychiatric report which appellant referenced on July 7, 2004, had been filed in New Hampshire proceedings scarcely seven months earlier.

But that was not all the trial court knew about appellant's mental state. In pleadings related to appellant's pretrial motion that he not be shackled, the court learned from the district attorney that, while appellant was incarcerated in New Hampshire, he was "disruptive and uncooperative with jail authorities there, refusing to dress," and that he had appeared in court in New Hampshire wrapped in a blanket. (3 CT 618).

That still is not all. The court was also aware that appellant had made pretrial statements explaining his defense to murder charges on the basis of bizarre notions, including that he had incorporated and therefore enjoyed corporate immunity from prosecution for his shooting of Officer Mobilio. (3

RT 664; 1 CT 76.)

Finally, during the guilt phase, appellant sought to defend against the charge of special circumstance murder on the ground that he was acting in "defense of liberty." Appellant believed that this defense gave him the right to shoot a police officer who was refueling his car. (10 CT 2355-2390. [Appellant's Memo. "Re Admissibility Of Defense, With Accompanying Proposed Order"].) When the trial court precluded appellant from introducing evidence in support of this defense, appellant became extremely emotional. (8 RT 1830.) Appellant then told the court that "I intend to sit in silent protest during the guilt phase, and I will not speak or raise any issues until the penalty phase." (*Id.*)

Despite all of this information the trial court had in its possession, the court did not declare a doubt as to appellant's competence. As explained below, the court had substantial evidence of appellant's incompetence, and its failure to express a doubt as to appellant's competence and suspend criminal proceedings violated due process and requires reversal of the judgment.

B. A Criminal Defendant Has A Due Process Right To Procedures Adequate To Ensure He Will Not Be Tried And Sentenced While Mentally Incompetent.

The trial and conviction of a defendant who is legally incompetent violates a defendant's right to due process of law. (*Pate v. Robinson* (1966)

383 U.S. 375, 378.) As Justice Kennedy has observed,

> Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so.

(*Riggins v. Nevada* (1992) 504 U.S. 127, 139 (conc. opn. of Kennedy, J.).)

In *Dusky v. United States* (1960) 362 U.S. 402, the Supreme Court announced the test for evaluating a defendant's competency to stand trial:

> [T]he "test must be whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him."

(*Id.* at 402.) Of course, to the extent that the test for competence relates to a defendant's "present ability to consult with his lawyer," that test is inapposite to a case in which a defendant represents himself. In such a case, the test for competence is whether the defendant "is able to understand the nature and purpose of the proceedings taken against him and to conduct his own defense in a rational manner. [Citations.]" (*People v. Merkouris* (1959) 52 Cal.2d 672, 678, overruled on another ground in *People v. Pennington, supra*, 66 Cal.2d at pp. 518–519; *People v. Huggins* (2006) 38 Cal.4th 175, 189; *People v. Murdoch* (2011) 194 Cal.App.4th 230.)

Although the Supreme Court has never "prescribe[d] a general standard with respect to the nature or quantum of evidence necessary to require resort to an adequate procedure for determining competency, it has explained that

"evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required." In some circumstances, even one of these factors may be sufficient. (*Drope, supra*, 420 U.S. at pp. 172, 180.)

The right to be tried only while competent is so critical a prerequisite to the criminal process that "state procedures must be adequate to protect this right." (*Pate, supra*, 383 U.S. at p. 378; see also *Drope v. Missouri* (1975) 420 U.S. 162, 172 [the failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial].) The Due Process Clause thus demands adequate protective procedures to minimize the risk that an incompetent person will be convicted. The Supreme Court has expressly recognized that one of the required procedural protections is "further inquiry," when there is a sufficient doubt raised about a defendant's competency. (*Drope, supra*, 420 U.S. at p. 180.) When a reasonable doubt has been raised, a court's failure to make further inquiry violates due process by depriving the defendant of his right to a fair trial. (*Robinson, supra*, 383 U.S. at pp. 385-86; *Pate v. Smith* (6th Cir. 1981) 637 F.2d 1068, 1072 ["Once a reasonable doubt arises as to the competence of a person to stand trial, the issue must be decided on the basis of a hearing."].)

In keeping with the Supreme Court's guidelines, California law specifically provides as follows:

> A person cannot be tried or adjudged to punishment while that person is mentally incompetent. A defendant is mentally incompetent for purposes of this chapter if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.

(Pen. Code § 1367.)

As this court explained in *People v. Jones* (1991) 53 Cal.3d 1115:

> "A defendant who, as a result of mental disorder or developmental disability, is 'unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner,' is incompetent to stand trial. (§ 1367.) When the accused presents substantial evidence of incompetence, due process requires that the trial court conduct a full competency hearing. Evidence is 'substantial' if it raises a reasonable doubt about the defendant's competence to stand trial."

(*Id.* at pp. 1152-1153 [citations omitted]. See also *People v. Danielson* (1992) 3 Cal.4th 691, 726, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.); *People v. Lawley* (2002) 27 Cal.4th 102, 131; *People v. Koontz* (2002) 27 Cal.4th 1041, 1063.) The court must consider "all of the relevant circumstances" when determining whether a reasonable doubt exists, and "counsel's opinion is undoubtedly relevant." (*People v. Howard* (1992) 1 Cal. 4th 1132, 1164.) "When there exists substantial evidence of the accused's incompetency, a trial court must declare a doubt and hold a hearing pursuant to section 1368 even absent a request by either party. (See *People v. Aparicio* (1952) 38 Cal.2d 565, 568; § 1368, subd. (a).)" (*Id.*) Failure to conduct a full evidentiary hearing violates fundamental due process and is reversible *per se. (Pate* v. *Robinson, supra,* 383 U.S. at p. 385; *People* v. *Pennington, supra,* 66 Cal.2d 508.)

In assessing whether a defendant has presented substantial evidence of

incompetence, this court has noted that "'more is required to raise a doubt [of competence] than mere bizarre actions or bizarre statements ... or psychiatric testimony that defendant is immature, dangerous, psychopathic, or homicidal or such diagnosis with little reference to defendant's ability to assist in his own defense.' " (*People v. Deere* (1985) 41 Cal.3d 353, 358 [citations omitted]; *People v. Ramirez* (2006) 39 Cal.4th 398, 467.) Thus, evidence is not substantial where it shows that the defendant simply makes threats to disrupt the trial, actually disrupts the trial, or makes statements during trial that indicate delusional thinking. (E.g., *People v. Ramirez*, *supra*, 39 Cal.4th at pp. 467-468 [defendant's threats of disruption and statements that he "will be avenged [because] Lucifer dwells within us all," held not to constitute substantial evidence]; *People v. Koontz*, *supra*, 27 Cal.4th at p. 1064 [defendant's "rambling, marginally relevant speeches during trial held "may constitute evidence of some form of mental illness," but does not constitute substantial evidence of incompetence]; *People v. Lewis* (2008) 43 Cal.4th 415, 524-525 [defendant's obscene outbursts in court and unwillingness to cooperate with counsel did not constitute substantial evidence of incompetence].

Thus, in order to meet the substantial evidence test, the evidence must show more than such disruptive, bizarre or obstreperous conduct. Instead, the evidence must raise a reasonable doubt "that [the defendant] lacked an understanding of the nature of the proceedings or the ability to assist in his defense," (*People v. Koontz*, *supra*, 27 Cal.4th at p. 1064; *People v. Lewis*,

supra, 43 Cal.4th at p. 525), or that he could not rationally conduct his own defense. (*People v. Merkouris, supra,* 52 Cal.2d at p. 678.)

C. Appellant Was Denied Due Process By The Trial Court's Failure To Suspend Criminal Proceedings Under Penal Code § 1368

While the test for substantial evidence may leave the trial court with much discretion in deciding to suspend the proceedings, there is one situation in which the court has no discretion to exercise:

> "If a psychiatrist ... who has had sufficient opportunity to examine the accused, states under oath with particularity that in his professional opinion the accused is, because of mental illness, incapable of understanding the purpose or nature of the criminal proceedings being taken against him or is incapable of assisting in his defense or cooperating with counsel, the substantial-evidence test is satisfied."

(*People v. Pennington*, *supra*, 66 Cal.2d at p. 519; *People v. Welch* (1999) 20 Cal.4th 701, 738.) Once the accused has come forward with such evidence, "due process requires that a full competence hearing be held as a matter of right. (*Pate v. Robinson* (1966) 383 U.S. 375, 384–386.) In that event, the trial judge has no discretion to exercise (*People v. Pennington*, *supra*, 66 Cal.2d at pp. 518–519), "even if the evidence is in conflict." (*People v. Welch*, *supra*, 20 Cal.4th at p. 738.) The duty exists "no matter how persuasive other evidence—testimony of prosecution witnesses or the court's own observations of the accused —may be to the contrary." (*People v. Stankewitz* (1982) 32 Cal.3d 80, 93, citing *People v. Pennington*, *supra*, 66 Cal.2d at p. 518.)

That was the case here. The trial court was aware that appellant had been examined by a psychiatrist, Dr. Drukteinis, in the New Hampshire extradition proceeding, and that Dr. Drukteinis had concluded that appellant "could not even identify himself, could not understand the court proceedings, and could not understand the difference between the Judge, the Prosecution, and the Defense." While the Drukteinis report was not itself before the court, that did not relieve the trial court of its responsibilities under section 1367 and 1368 to ensure that the proceedings comported with due process. The court was aware that the psychiatric report had been provided by the prosecution in discovery (1 RT 68), and that both the prosecution and the defense were aware of that report. The court was also aware of the conclusion of that report when, on July 7, 2004, appellant told the court – without contradiction from the People – that Drukteinis had actually rendered that opinion that appellant was not competent to stand trial. Having learned that a psychiatrist had concluded that there was a reasonable doubt regarding appellant's competence, the trial court had no discretion. The court was obligated to suspend proceedings to investigate whether appellant was in fact competent to stand trial.[4]

Further, the court in appellant's case had ample evidence corroborating

---

[4] Nor is it significant that the Drukteinis report was not filed under oath. The courts of this state have held that the fact that a doctor's report is filed not under oath does not deprive the report of the force of substantial evidence of incompetence. (*People v. Tomas* (1977) 74 Cal.App.3d 75, 91, citing *People v. Laudermilk* (1967) 67 Cal.2d 272, 286. Accord *United States v. Moore* (9th Cir. 1972) 464 F.2d 663, 666.)

the conclusions of the Drukteinis report. It knew that appellant had espoused the bizarre theory that he was immune from prosecution because he had incorporated; it knew that appellant had appeared in court in New Hampshire dressed only in a blanket; and it knew that appellant believed he was entitled to shoot a police officer based on a "defense of liberty" rooted in the American Revolutionary War. The court also knew that when it precluded appellant from mounting his defense of liberty, appellant became extremely emotional, and informed the court he would not sit in silent protest and not participate in the trial at all. These facts fully corroborated the opinion of Dr. Drukteinis that appellant could not conduct his defense in a rational manner.

This is thus not a case in which the expert's opinion regarding the defendant's mental state was unrelated to its effect on trial competence. (Cf. *People v. Young* (2005) 34 Cal.4th 1149, 1216 [although expert testified to defendant's organic brain disorder, "he did not relate his findings in terms of defendant's competency to stand trial."].) The court was informed that Dr. Drukteinis *directly linked* appellant's mental illness to his trial competence. As appellant described Drukteinis's findings, appellant "could not even identify himself, could not understand the court proceedings, and could not understand the difference between the Judge, the Prosecution, and the Defense." (4 CT 864-865.) These are precisely the findings that constitute trial incompetence. (*Dusky v. United States*, *supra*, 362 U.S. at p. 402; *People v. Pennington*, *supra*, 66 Cal.2d at pp. 516-518.)

Appellant's case is no different from others in which the trial court was held to err by failing to suspend proceedings in the face of substantial evidence of incompetence. This court's decision in *People v. Koontz*, *supra*, 27 Cal.4th 1041, is highly instructive. The appellant in *Koontz* similarly complained that the trial court erred by failing to suspend proceedings in the face of substantial evidence of incompetence. Koontz claimed there was substantial evidence of his incompetence based on the fact that he was unable to cooperate with and assist his original appointed counsel, he fired several investigators, being unable to interact with them in a rational manner, he had made incoherent, rambling and nonsensical statements at trial, he presented "an irrational defense based on self-defense against a nonexistent knife and a delusional belief that the shot he fired into the victim's abdomen did not really hurt him, as well as an untenable suggestion that the paramedics actually killed the victim by negligent treatment." (*Id.* at p. 1064.) Defendant further asserted that he presented a number of witnesses in his defense who were either not helpful or damaging to the defense. (*Id.*)

This court held that such evidence did not constitute substantial evidence requiring the court to suspend criminal proceedings. Such evidence, said the court, "d[id] not show that he lacked an understanding of the nature of the proceedings or the ability to assist in his defense." (*Id.*) Importantly for the case at bar, this court contrasted the factual showing in *Koontz* with that in *Howard v. State* (Miss.1997) 701 So.2d 274, where there *was* substantial evidence of incompetence and the trial court erred by failing to suspend

criminal proceedings. *People v. Koontz*, *supra*, 27 Cal.4th at p. 1064-1065.) The evidence presented in *Howard* consisted of the following: the defendant succeeded in waiving his right to counsel and proceeded immediately to trial without filing any pretrial motions or exercising any challenges during voir dire, even as he objected to the prosecutor's offer to excuse prospective jurors who clearly were biased against him. As this court described it,

> "[Howard] made no attempt to challenge the the prosecution's case, which rested almost entirely on forensic bite-mark evidence. His questioning of witnesses rarely had any relevance to the issues in the case. (Citation.) Howard's theory was that Howard's own family members had killed the victim and were framing him; he even suggested one of the jurors might have committed the crime. (*Ibid.*) During the one-hour sentencing phase, Howard refused to say anything to the jury. The trial judge never ordered a competency hearing, although prior to trial he did enter an order requiring that Howard undergo a mental examination, with which Howard refused to cooperate. On various occasions each of the four attorneys appointed to represent or assist Howard articulated to the court their concern that he was incompetent to stand trial."

(*Id.*)

On this evidence, the Mississippi Supreme Court correctly concluded the trial judge was thus apprised of information that should have raised a doubt about Howard's competency. (*Id.*)

The evidence in appellant's case was at least as strong as in *Howard*, if not stronger. First, unlike *Howard*, the trial court in appellant's case *did* have evidence from a psychiatrist that appellant was not competent. Further, as in *Howard*, appellant performed only a cursory voir dire, challenging only

three jurors for cause (RT 1262, 1300.) Most tellingly, appellant did not challenge four jurors who stated that they would automatically vote for the death penalty if it were proven that the defendant murdered a police officer in the performance of his duties. (See Argument VII.) Nor did he exercise peremptory challenges against these jurors, thus permitting them to sit on his jury. Further, appellant not only failed to challenge the prosecution's case; he actually attempted to stipulate to the entire prosecution case. (See 8 CT 1982-1984 ["Defendant's Proposed Stipulations"].) In this pleading, appellant offered to stipulate to every material fact in the prosecution's case. Appellant offered 14 detailed stipulations, the first three of which were the following:

1. On the 19th of November, 2002, at approximately 1:35 a.m., at Warner's Petroleum in Red Bluff California, I, Andrew Mickel, ambushed and shot Officer David Mobilio, twice diagonally in the side of his back and once in the back of the head, thereby killing him.

2. Officer Mobilio was on duty at the time he was shot and I was aware that he was on duty.

3. I, Andrew Mickel, personally conceived, constructed, and left at the scene, the canvas rattlesnake flag which states, "This was a political action. Don't tread on us."

(8 CT 1982.)

As in *Howard*, appellant tried to defend his case on a bizarre theory. While Howard's defense involved a delusion about the need for self-defense and the lack of harm caused by shooting the victim, appellant's theory – that he was acting pursuant to a "defense of liberty" based on American

Revolutionary War principles, likening police officers to the Red Coats – was equally delusional. (2 CT 483-484.) Appellant's guilt phase argument consisted of 7 sentences and lasted about two minutes, in which he told the jury to find him guilty. (8 RT 1892.) His penalty phase presentation consisted of a rambling discourse on the Revolutionary War, touching on the Declaration of Independence, the Federalist Papers, the Constitution, Paul Revere's midnight ride, the Colonists' battles against the British Redcoats, the Shot Heard 'Round the World, the Patriot Act, the development of professional police forces and the FBI, Prohibition, the St. Valentine's Day Massacre, and his travels to Israel and the Occupied Territories. Appellant then described his planning and execution of the crime in great detail. (10 RT 2174-2178.) He told the jurors that what he was trying to accomplish was "for you guys to get this liberty and have this liberty." (10 RT 2293.) His penalty phase argument consisted essentially of the exhortation, "Give me liberty or give me death." (10 RT 2295.)

The evidence of incompetence in appellant's case was thus strikingly similar to that offered in *Howard v. State*. The only material difference was that the trial court in appellant's case actually was aware of a recent psychiatric report finding appellant incompetent. If the evidence in *Howard* was sufficient to raise a doubt as to competence, the evidence in the instant case,

supplemented by a psychiatric report, *a fortiori* was sufficient to raise a doubt.

In this respect, appellant's case is similar to *People v. Murdoch* (2011) 194 Cal.App.4th 230, where the court of appeal reversed for failure to stay proceedings under section 1368. There, prior to his trial for assault with a deadly weapon, criminal proceedings against Murdoch were initially suspended pursuant to section 1368, but then reinstated after a psychiatric examination. The doctors found that Murdoch suffered from severe mental illness but was competent due to medication he had been given, but was now refusing to take. The doctors warned that appellant could decompensate without medication. The court reinstated criminal proceedings. Several months later, the court granted appellant's motion for self representation. Prior to the taking of evidence at trial, appellant told the court his defense to the charges was that the victim was not human, as indicated by the fact he lacked shoulder blades, which are "symbolic of angelic beings." (*Id.* at p. 233.) During cross examination, appellant asked the victim, "Can you shrug your shoulders like this?" (*Id.*) He was found guilty.

On this evidence, the court of appeal found the trial court erred by not re-instituting competency proceedings during trial. The court explained that "[d]efendant's statements taken together with the experts' reports provide the substantial evidence necessary to demonstrate a reasonable doubt as to whether he had in fact decompensated and become incompetent as the experts had

warned." (*Id.* at p. 238.) The court of appeal further observed that "[w]hile it may be argued there is nothing in the record to call into question whether the defendant understood the nature and purpose of the proceedings, the evidence established a reasonable doubt as to whether he could conduct his own defense in a rational matter." (*Id.*)

Again, the evidence of incompetence in appellant's case was equal to or stronger than in *Murdoch*. While the experts in *Murdoch* stated that appellant was competent as long as he remained on medication, the Drukteinis report, as communicated to the trial court, contained no such conditionality: the report simply stated that there was a reasonable doubt as to appellant's competence. Further, the defense offered in *Murdoch,* while certainly strange, was no more so than appellant's defense of liberty. While the defense in *Murdoch* was rooted in some biblical passages, appellant's defense of liberty was rooted in Revolutionary War rhetoric, the Shot Heard Round The World, and Paul Revere's Midnight Ride. Moreover, the idea that a defense of liberty gave one the right to ambush a police officer while he refueling his car, or that appellant was immune from criminal charges because he had incorporated and enjoyed corporate immunity, similarly had no basis in reality. In short, the combination of the Drukteinis report and appellant's bizarre defense and request to the jury to "give me liberty or give me death," compels the conclusion that, as in *Murdoch*, appellant could not conduct his own defense in a rational manner.

Because the trial court was confronted with substantial evidence of appellant's incompetence, its failure to declare a doubt and suspend proceedings requires reversal of the conviction. (*People v. Ary* (2011) 54 Cal.4th 510, 515, fn. 1; *People v. Young* (2005) 34 Cal.4th 1149, 1217 [when "a full competence hearing is required but the trial court fails to hold one, the judgment must be reversed "].)[5]

---

[5] As indicated in this brief, appellant attempted to keep from the court and jury any evidence of his lack of competence. Continuing in that vein, Mr. Mickel has asked that the undersigned counsel inform the court that he does not agree with his appellate counsel's decision to assert claims based on his lack of competence.

II. APPELLANT WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY HIS ATTORNEY'S FAILURE TO INFORM THE TRIAL COURT THAT, LESS THAN TWO MONTHS BEFORE APPELLANT'S ARRAIGNMENT IN CALIFORNIA AT WHICH APPELLANT MOVED TO REPRESENT HIMSELF, A PSYCHIATRIST FILED A WRITTEN REPORT IN THE NEW HAMPSHIRE EXTRADITION PROCEEDINGS STATING THAT APPELLANT WAS NOT COMPETENT TO STAND TRIAL.

A. Summary of Argument

From the time of his arraignment in Tehama County Superior Court on January 30, 2003, until the granting of appellant's motion for self-representation on December 8, 2003, appellant was represented by court-appointed counsel, James Reichle. In that ten month period, Mr. Reichle advocated, by written motion and in open court, for appellant to be granted the right to waive counsel and represent himself. In his written motion, Reichle told the court that "only if there is substantial evidence before the Court of [appellant's] incompetence to stand trial," would the trial court be obligated to hold a hearing on appellant's competence to waive counsel. (3 CT 743.) Mr. Reichle then told the court, "[t]here is no such evidence in this case." (*Id.*)

The latter was a remarkable statement in view of what Mr. Reichle either knew or should have known. That is because, as described above, less than two months before appellant's arraignment, Dr. A.M. Drukteinis, M.D., the psychiatrist retained by defense counsel in appellant's New Hampshire extradition proceedings, filed a six-page written psychiatric report in the New

Hampshire Superior Court stating that "Mr. McCrae's competency to stand trial, or to rationally participate in other court proceedings is highly questionable because of his irrational thinking." (2d Supp. CT 25.)

The appellate record demonstrates that Mr. Reichle actually had the New Hampshire extradition file, which included the Drukteinis psychiatric report. Reichle's knowledge of this report is reflected by the fact that he moved to seal the report and to prevent the court or the parties from making the report public without a prior court order. (3 CT 572-580; 1 RT 68-78.)

Reichle was under an unequivocal professional obligation (1) to obtain both the extradition file from the New Hampshire court, and the files of Mr. Mickel's New Hampshire counsel; and (2) to make known to the trial court the psychiatrist's opinion, contained in those records, that Mr. Mickel was not competent to stand trial or waive counsel. His failure to advise the trial court of the contents of the Drukteinis psychiatric report amounted to conduct that fell below an objectively reasonable standard of competence expected to defense counsel in capital cases. Further, Reichle's failure to advise the trial court of the Drukteinis report was prejudicial because it would have constituted substantial evidence of appellant's incompetence to waive the right to counsel, and would have precluded the trial court from accepting appellant's waiver of that right without further proceedings to determine appellant's competency.

Appellant is well aware that it is usually more appropriate to bring

claims of ineffective assistance of counsel in habeas corpus rather than on direct appeal because the former permits an exploration of counsel's tactical reasons for his conduct. (*People v. Cowan* (2010) 50 Cal.4th 401, 493, fn. 31.) As explained below, however, this case presents one of those "rare instances where there is no conceivable tactical purpose for counsel's actions," (*People v. Lopez* (2008) 42 Cal.4th 960, 972), in either failing to obtain the court file from a prior phase of his client's case, or in failing to advise the court of a recent psychiatric opinion that his client was not competent to waive the right to counsel.

As explained below in Part D, the judgment should therefore be reversed.

B. Relevant Facts

As described above, after shooting Officer Mobilio, appellant fled to New Hampshire, where he was arrested on November 26, 2002. (2d Supp. CT 129.) California sought extradition. (2d Supp. CT 64.) On January 8, 2003, Mr. Mickel's New Hampshire counsel, Mark L. Sisti, filed a petition for writ of habeas corpus in the New Hampshire Superior Court alleging as a defense to the extradition proceedings that Mr. Mickel was not competent to stand trial. (2d Supp. CT 60-84.) In the petition, Sisti expressed a doubt as to appellant's competence, and his "lack of ability to understand the proceedings against him as well as the roles of those involved in those proceedings." (2d Supp. CT 60.) Sisti's habeas petition was supported by the six-page Drukteinis' psychiatric report, dated December 17, 2002, in which Dr. Drukteinis opined that Mr.

Mickel had "a history of Depressive Disorder and was likely suffering from a Delusional Disorder." (2d Supp. CT 84.) On the basis of his investigation and testing of Mr. Mickel, Dr. Drukteinis rendered the following opinion:

> "In my opinion, Mr. McCrae's competency to stand trial, or to rationally participate in other court proceedings, is highly questionable because of his irrational thinking. Most prominently, he would refuse a plea of insanity because he lacks the insight into his mental disturbance. This, of course, could remove any reasonable defense for him, since his trial cannot be based on his delusional aim at revolution."

(2d Supp. CT 84.)

Without conducting a hearing, the New Hampshire court denied the habeas petition on the ground that competence was not required for extradition, and that Mr. Mickel appeared "capable of communicating with this attorney and understands the nature of the extradition proceedings." (2d Supp. CT 172-173, 175.)

Mr. Mickel was then extradited to California, where he first appeared in Tehama County Superior Court on January 30, 2003. (2 CT 498; 1 RT 5-7.) At that hearing, Mr. Mickel asked the court "to recognize my right to represent myself...." (1 RT 6.) The court put the matter over for further arraignment and appointment of counsel. (*Id.*)

The next hearing took place on February 4, 2003. Mr. Reichle was present, ostensibly to receive the appointment as counsel. Instead, he told the court:

"Yes, sir, James Reichle, tentatively appointed supporting the defendant's request to represent himself, with co-counsel."

(1 RT 9.)

Although Reichle was "supporting" Mr. Mickel's request for self-representation, Reichle did not advise the court of Dr. Drukteinis's recent opinion questioning Mr. Mickel's competency. At that point, there was no evidence in the record that Reichle was aware of the Drukteinis report.

The court then asked Mr. Mickel if he wished to press his motion to represent himself. (1 RT 9.) After colloquy with the court during which the court observed that Mr. Mickel "did not demonstrate a very sophisticated or, for that matter, any grasp of the law," Mr. Mickel agreed to permit Mr. Reichle to represent him through the preliminary hearing. (1 RT 14.) Mr. Reichle represented Mr. Mickel until the trial court accepted Mr. Mickel's waiver of counsel ten months later, on December 8, 2003.

As early as April 25, 2003, it became clear from the trial record that Reichle in fact had the New Hampshire file and the Drukteinis report. In this regard, the record discloses the following events. On April 7, 2003, Reichle filed a "Declaration of Defendant's Counsel Re Protective Orders." (3 CT 572-580.) In that document, Reichle explained that he had reviewed "over 11,000 pages of discovery detailing investigation, including interviews with potential witnesses." (3 CT 572.) Reichle then stated that "[a] review of the discovery reveals potential evidence with little or no probative value for

purposes of the preliminary examination that would, if announced publicly, undoubtedly and irrevocably prejudice the Defendant in the eyes of potential jurors." (3 CT 573.) He then stated, cryptically:

> "There is no way to adequately describe the potential for prejudice without the ability to provide factual detail."

(3 CT 573.) Reichle asked for "the opportunity to present an offer of proof to the Court under protective order to demonstrate how a few specific items of evidence would irremediable prejudice [sic] if publicized." (*Id.*)

The court took up Reichle's request at a hearing on April 22, 2003. (1 RT 66 et seq.) Reichle told the court of his concerns regarding these categories of evidence:

> All I am focused on here is that there was, of course, an extensive investigation involving local authorities, Department of Justice, the F.B.I., and just about everybody else who could get their fingers on anything. And a lot of people were interviewed, and a lot of material was provided, some of which could be significantly inflammatory. And I believe, and obviously it is my belief at this point in reviewing the discovery, it has little or no relevance to the case ..."

(1 RT 68.) Reichle told the court that he wanted the court to "establish a mechanism whereby, either going in-camera with the Prosecution, that the defense would be allowed to make – or by declaration under seal – that the defense would be able to point to , I think there is [sic] about half a dozen that I am aware of [,] items of significant potential prejudice with little evidentiary

value, and have the court consider those." (1 RT 69.) Reichle further stated that, "because of the nature of the request I am making, I cannot articulate for the Court at this time what the nature of those items are." He nonetheless asked for an *in camera* hearing prior to any effort by the prosecution to introduce evidence in those categories. (1 RT 68-70.)

The trial court then asked Reichle to provide the court, under seal, with a list of the items Reichle want to protect from disclosure. (1 RT 74-75.) The court asked the People to file a response "in a couple of days," (1 RT 77), and stated that it would take up the matter at an *in camera* hearing on May 1, 2003. (1 RT 78.)

On April 25, 2003, Reichle filed a declaration listing the categories of evidence he wanted to shield from public disclosure. One category included:

> "any mention of the extradition proceedings in New Hampshire or any information presented therein, including the contents or sealing of the Drukteinis report as to much of which Defendant asserts it was divulged in violation of his attorney-client and psychotherapist privileges."

(3 CT 643B-C.)

On April 29, 2003, the People filed a response stating that they "do not intend to present any evidence in eight categories listed in Defendant's Declaration Filed Under Seal dated April 24, 2003 ...." (3 CT 643F-G.)

On May 1, 2003, the trial court conducted an *in camera* hearing on appellant's motion to seal the eight categories of documents, including the New Hampshire extradition file and the Drukteinis report. The court stated that, in light of the People's statement that they did not intend to use the documents, it could deny the Reichle's motion without prejudice. (1 RT 83.) Reichle told the court that he and the district attorney had reached an agreement that if the People intended to introduce evidence in those categories, then the People would give appellant notice and the matter could be resolved *in camera*. (1 RT 83-84.) In light of that agreement, Reichle withdrew his motion to prevent disclosure of the documents, including the Drukteinis report. (1 RT 84-85.) The court concluded by ordering the parties' filings to be sealed and not released to the public. (1 RT 85.)

Further pretrial proceedings occurred over the following months, with Mr. Reichle still representing appellant. As indicated above, the question of appellant's self-representation was scheduled for a hearing on December 8, 2003. Prior to the December 8th hearing, on November 20, 2003, Reichle filed a "Motion And Points And Authorities: Defendant's Self-Representation As A Matter Of Right." (3 CT 738-746.) In that motion, Reichle told the court the following:

> "Only if there is substantial evidence before the Court of incompetence to stand trial is the trial court required to make inquiry by requiring the holding of the appropriate hearings on that issue. [Citation.] There is no such evidence."

(3 CT 743.)

Again, although Reichle told the court there was no substantial evidence of Mr. Mickel's incompetency, he failed to advise the court of Dr. Drukteinis' opinion to the contrary.

At the December 8, 2002 hearing on appellant's *Faretta* motion, Mr. Reichle submitted the matter without argument. (2 RT 250.) Again, he failed to inform the court that a psychiatrist had determined that appellant was not competent to stand trial and, *a fortiori*, that appellant was not competent to waive the right to counsel.

At the conclusion of the December 8th hearing, the court granted appellant's *Faretta* motion. (2 RT 254.) The court then relieved Mr. Reichle as counsel, and appointed him advisory counsel. (2 RT 256.)

C. Mr. Reichle Rendered Constitutionally Ineffective Assistance By Failing To Provide The Trial Court With The Drukteinis' Report, Containing The Psychiatrist's Recent Opinion That Appellant Was Not Competent to Stand Trial

In *People v. Lopez* (2008) 42 Cal.4th 960, this court reviewed the principles for evaluating, on the appellate record, a claim of ineffective assistance of counsel:

> "In order to establish a claim of ineffective assistance of counsel, defendant bears the burden of demonstrating, first, that counsel's performance was deficient because it 'fell below an objective standard of reasonableness [¶] ... under prevailing professional norms.' [Citations.] Unless a defendant establishes

> the contrary, we shall presume that 'counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy.' [Citation.] If the record 'sheds no light on why counsel acted or failed to act in the manner challenged,' an appellate claim of ineffective assistance of counsel must be rejected 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.' [Citations.] If a defendant meets the burden of establishing that counsel's performance was deficient, he or she also must show that counsel's deficiencies resulted in prejudice, that is, a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' [Citation.]"

(*Id.* at p. 966, quoting *People v. Ledesma* (2006) 39 Cal.4th 641, 745-746.)

As explained below, Reichle's failure to disclose the Drukteinis report to the trial court was deficient performance under the prevailing professional norms. Moreover, it is appropriate to consider this claim on the appellate record because there simply could be no satisfactory explanation for Reichle's failure to present the Druketinis report to the trial court in connection with appellant's motion for self-representation. Reichle's failure was prejudicial in that the opinion expressed in the report would have required the trial court to suspend proceedings and investigate appellant's competence to waive counsel.

1. Defense Counsel's Failure To Provide The Trial Court With The Drukteinis Psychiatric Report Was Conduct That Fell Below An Objective Standard Of Reasonableness Under Prevailing Norms.

Appellant's claim that Reichle rendered ineffective assistance of counsel is premised on Reichle's failure to provide the trial court with the

Drukteinis psychiatric report at the time appellant sought to waive his right to counsel. This failure was critical because, before a court may permit a defendant to waive his right to counsel, the trial court must be satisfied that the defendant is competent to do so. (*Godinez v. Moran* (1993) 509 U.S. 389, 396.)

The law is clear that defense counsel, who possesses substantial evidence of his client's incompetence, has a duty to inform the court of that evidence, and that counsel's failure to do so constitutes deficient performance. (*Ford v. Bowersox* (8th Cir. 2001) 256 F.3d 783, 786 ["Counsel's failure to request a competency hearing was objectively unreasonable if evidence raised substantial doubt about Ford's mental competence to stand trial."]; *Kibert v. Peyton* (4th Cir. 1967) 383 F.2d 566, 569 ["the failure of the defendant's lawyer to explore the matter and adduce evidence in court where there was reason for doubt as to the mental condition of the accused, constituted a denial of his right to effective assistance of counsel."]; *Speedy v. Wyrich* (8th Cir. 1983) 702 F.2d 723, 726 ["The failure of trial counsel to request a competency hearing where there was evidence raising a substantial doubt about a petitioner's competence to stand trial may constitute ineffective assistance of counsel."]; *Loe v. United States* (E.D.Va.1982) 545 F.Supp. 662, 666 [same].) The state courts are in accord. *(State v. Fleming* (Wash. 2001) 16 P.3d 610, 616-617; *State v. Johnson* (Wis. 1986) 395 N.W.2d 176, 215-220; *State v. Johnson*, (Neb.App. 1996) 776, 551 N.W.2d 742, 749; *Wilcoxson v. State* (Tenn.App. 1999) 22 S.W.3d 289; *People v. Kinder* (N.Y.App. 1987) 512

N.Y.S.2d 597, 600. See also *People v. Corona* (1978) 80 Cal.App.3d 684, 706 ["when trial counsel fails to acquire facts necessary to a crucial defense or to follow the facts already in his possession or to develop facts to which his attention is called, ... his failure to raise a defense or defenses which could have been established by making the aforestated requisite efforts cannot be justified by reference to trial strategy or tactics."].)

The holding of these cases – that the standard of care for criminal defense attorneys requires them to disclose readily available evidence of a defendant's incompetence – is fully consistent with the A.B. A. Standards for Criminal Justice. The A.B.A. Standards, on which this court has relied (*In re Lucas* (2004) 33 Cal.4th 682, 724), similarly provided that defense counsel should move for evaluation of a defendant's competence to stand trial whenever counsel has a good faith doubt as to the defendant's competence, even if the client objects to such a motion being made. (ABA Standards for Criminal Justice (1986) § 7-4.2(c). That section provides:

> Defense counsel should move for evaluation of the defendant's competence to stand trial whenever the defense counsel has a good faith doubt as to the defendant's competence. If the client objects to such a motion being made, counsel may move for evaluation over the client's objection. In any event, counsel should make known to the court and to the prosecutor those facts known to counsel which raise the good faith doubt of competence.

The cases cited above have found, on facts similar to the instant case, that defense counsel rendered deficient performance by failing to advise the

court of substantial evidence of the defendant's incompetence. Thus, in *State v. Johnson*, *supra*, 395 N.W.2d 176, defendant was charged with first-degree murder. Defense counsel hired two experts to assist in preparation of a mental defense. Each expert sent a letter to counsel expressing doubts as to the defendant's competence. The letter from a clinical psychologist stated, "I have serious concerns regarding his [Johnson's] competency to stand trial." The letter further stated, "It is my belief that Mr. Johnson's thinking impinges on his ability to rationally aid in the preparation of his defense in an adversarial setting." (*Id.* at p. 211.) Defense counsel also received a letter from his other expert, a psychiatrist, which said: "I have serious doubts about [Johnson's] competency to stand trial," and that there were serious problems regarding Johnson's capacity to reasonably and rationally confer with defense counsel in his defense. (*Id.* at p. 212.) As in Mr. Mickel's case, defense counsel in *Johnson* did not produce the opinions of these experts in court, and the defendant was convicted. Johnson then challenged his conviction on the ground that his counsel rendered ineffective assistance by failing to introduce the evidence of competence. At a hearing on that issue, trial counsel stated that he chose not to introduce the evidence because he did not want his client examined by other psychiatrists, and he personally believed his client to be competent. (*Id.* at p. 214.)

On direct appeal, the Wisconsin Supreme Court granted relief on the Sixth Amendment claim. It noted that defense counsel "had reliable evidence which created a reason to doubt Johnson's competency to stand trial." (*Id.* at p. 224.) The court then concluded:

> When a defense counsel fails to bring evidence of a client's incompetence to the court's attention, the court is deprived of the evidence necessary to determine whether a competency hearing is required. It follows then that, where the evidence withheld is sufficient to raise a bona fide doubt (reason to doubt) as to the defendant's competence, the failure to present this information to the court deprives the defendant of his or her constitutional right to a fair trial. This deprivation of the defendant's right to a fair trial renders the outcome of the trial unreliable.

(*Id.* at pp. 223-224.)

The Wisconsin Supreme Court further held that counsel had no legitimate tactical reason for failing to raise substantial evidence of the defendant's incompetence. As the court explained: "We believe that considerations of strategy are inappropriate in mental competency situations. Thus, we hold that strategic considerations do not eliminate defense counsel's duty to request a competency hearing." (*Id.* at p. 221.)[6]

Similarly, in *In re Fleming*, *supra*, 16 P.3d 610, the defendant had been

---

[6] In making this holding, the Wisconsin Supreme Court in *Johnson* refused to follow a Fifth Circuit case, *Enriquez v. Procunier*, 752 F.2d 111, 114 (5th Cir.1984), cert. denied, 471 U.S. 1126, which – according to *Johnson* – reached a contrary conclusion that there may be a tactical reason for failing to present the court with substantial evidence of incompetence. (*State v. Johnson*, *supra*, 395 N.W.2d at p. 221.) Unlike *Johnson* and the instant case, however, counsel in *Enriquez v. Procunier* actually submitted evidence of his client's competence to the trial court prior to trial, 752 F.2d at p. 113, but the trial court did not find that evidence compelling. The defense lawyer *did* make a tactical decision in that case, but the decision was not to present an insanity defense. (*Id.* at p. 114.) As such, that case has no bearing on appellant's very different situation in which counsel failed to provide the trial court with known evidence of incompetence.

found incompetent by a psychiatrist hired by his former counsel. The defendant, with new counsel, entered a guilty plea, which defendant later moved to set aside on the ground that his second attorney rendered ineffective assistance by failing to advise the court of the prior finding that he was not competent. The Washington Supreme Court agreed, holding that the defendant's incompetency cannot be waived by his counsel. The court explained that the record established that "defense counsel knew there was an expert opinion that Fleming was incompetent to stand trial," that this "medical evidence was available at the time Fleming entered into the plea of guilty, and that "defense counsel failed to raise incompetency during all proceedings." (*Id.* at p. 616-617.) While the defense lawyer's tactical reasons were not explored, as in *State v. Jackson*, the Washington Supreme Court held that "[w]hen defense counsel knows or has reason to know of a defendant's incompetency, tactics cannot excuse failure to raise competency at any time "so long as such incapacity continues." (*Id.* at p. 617.)

Based on the foregoing authorities, there can be no doubt that the prevailing norms at the time of Mr. Mickel's trial obligated counsel, who possesses substantial evidence of his client's incompetence, to make such evidence known to the trial court. Mr. Reichle possessed such evidence in the form of the Drukteinis report. His failure to provide that evidence to the trial court prior to petitioner's waiver of his right to counsel constituted deficient performance.

Nor could Reichle's failing have been the result of any tactical decision. As in *State v. Johnson*, Reichle, faced with a psychiatric report, could not be excused from presenting the Drukteinis report based on Reichle's own, untrained belief that his client was competent. (See *Pate v. Robinson* (1966) 383 U.S. 375, 386 [holding that defendant's apparently competent demeanor could not be relied upon to dispense with hearing on competence in view of history of mental illness]; *People v. Hale* (1988) 44 Cal.3d 531, 541; *State v. Johnson, supra*, 395 N.W.2d at p. 221.) Indeed, the A.B.A. Guidelines address this precise point. They provide that "[c]ounsel's own observations of the client's mental status, while necessary, can hardly be expected to be sufficient to detect the array of conditions (e.g., post-traumatic stress disorder, fetal alcohol syndrome, pesticide poisoning, lead poisoning, schizophrenia, mental retardation) that could be of critical importance." (A.B.A. Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. Feb. 2003) Guideline 4.1 - The Defense Team and Supporting Services, at p. 31.)

Nor could Reichle, faced with the psychiatric opinion that appellant was not competent, have been excused from presenting this evidence by Mr. Mickel's contrary instructions. "An attorney cannot blindly follow a client's demand that his competency not be challenged. *Bundy v. Dugger*, 816 F.2d 564, 566-67 n. 2 (11th Cir.), cert. denied, 484 U.S. 870 (U.S.1987)." (*Agan v. Singleterry* (11th Cir. 1994) 12 F.3d 1012, 1018.) Thus, "defense counsel does not provide ineffective assistance of counsel or violate the defendant's due process rights by seeking to prove the defendant's incompetence over the

defendant's objections." (*People v. Harris* (1993) 14 Cal.App.4th 984, 994.)

In sum, Reichle's failure introduce the Drukteinis report in court prior to petitioner's waiver of his right to counsel constituted deficient performance under *Strickland's* first prong. As explained below, this failure was also prejudicial.

2. Reichle's Failure To Introduce The Drukteinis Report Was Prejudicial.

In *Wiggins v. Smith* (2003) 539 U.S. 510, the Supreme Court explained the test for prejudice in a claim that defense counsel failed to obtain evidence:

> In order for counsel's inadequate performance to constitute a Sixth Amendment violation, petitioner must show that counsel's failures prejudiced his defense. *Strickland*, 466 U.S., at 692. In *Strickland*, we made clear that, to establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id., at 694. In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence.

(*Wiggins*, *supra*, 539 U.S. at p. 534.)

Consistent with *Wiggins*, the court must "reweigh" the evidence of appellant's competence, including the Drukteinis report, to decide whether the totality of the evidence would have required the court to declare a doubt and suspend proceedings under Penal Code section 1368.

This analysis is not difficult in the instant case. The law is clear that, had the trial court been presented with the Drukteinis report, the court would have been *required* to hold a hearing on appellant's competency to waive his right to counsel. While what constitutes substantial evidence in a proceeding under section 1368 "'cannot be answered by a simple formula applicable to all situations' [citation.]," (*People v. Laudermilk* (1967) 67 Cal.2d 272, 283), this court has held that "the testimony of one mental health professional that the defendant is unable to assist in his or her defense because of a mental defect constitutes substantial evidence sufficient to compel a hearing. (*People v. Stankewitz* (1982) 32 Cal.3d 80, 92, 648 P.2d 578.)" (*People v. Castro* (2000) 78 Cal.App.4th 1402, 1415-1416, overruled on other grounds, *People v. Leonard* (2007) 40 Cal.4th 1370.) This court made the same point in *People v. Pennington*, (1967) 66 Cal.2d 508: "If a psychiatrist or qualified psychologist [citation], who has had sufficient opportunity to examine the accused, states under oath with particularity that in his professional opinion the accused is, because of mental illness, incapable of understanding the purpose or nature of the criminal proceedings being taken against him or is incapable of assisting in his defense or cooperating with counsel, the substantial-evidence test is satisfied." (*Id.* at p. 519. See also *People v. Welch*, *supra*, 20 Cal.4th at p. 738.)

While Dr. Drukteinis' report was not filed under oath, that is not significant. As noted above, the courts of this state have held that the fact that a doctor's report is filed not under oath does not deprive the report of the force of substantial evidence of incompetence. (*People v. Tomas* (1977) 74

Cal.App.3d 75, 91, citing *People v. Laudermilk* (19) 67 Cal.2d 272, 286, and *United States v. Moore* (9th Cir. 1972) 464 F.2d 663, 666.) Additionally, *Wiggins v. Smith, supra*, 539 U.S. 510, is controlling on this point. There, the court found that defense counsel's investigation in a capital case was ineffective in failing to uncover a substantial amount of mitigating evidence. The question whether counsel would have presented such evidence at trial was the essence of the prejudice analysis. Thus, the court held that "[g]iven both the nature and the extent of the abuse petitioner suffered, we find there to be a reasonable probability that a competent attorney, aware of this history, would have introduced it at sentencing in an admissible form." (*Id.* at p. 535.) In the same way, had a competent attorney obtained the Drukteinis report, he "would have introduced it at sentencing in an admissible form." That is to say, a competent attorney would have simply complied with California law requiring that the psychiatrist's opinion, which was filed in the New Hampshire court, be reduced to a sworn declaration for admission in a California court.

Had Reichle provided the trial court with the Drukteinis report, the trial court would therefore have been presented with substantial evidence of appellant's incompetence, and it would have been required to suspend the proceedings. The failure to hold such a hearing under Penal Code section 1368 would have required reversal. As this court explained in *People v. Welch* (1999) 20 Cal.4th 701:

> Once the accused has come forward with substantial evidence of incompetence to stand trial, due process requires that a full competence hearing be held as a matter of right. (*Pate v.*

> *Robinson* (1966) 383 U.S. 375, 384-386.) In that event, the trial judge has no discretion to exercise. (*People v. Pennington*, supra, 66 Cal.2d at pp. 518-519.) As we also have noted, substantial evidence of incompetence is sufficient to require a full competence hearing even if the evidence is in conflict. (*People v. Stankewitz*, supra, 32 Cal.3d at pp. 92-93.) We have concluded that where the substantial evidence test is satisfied and a full competence hearing is required but the trial court fails to hold one, the judgment must be reversed. (*Ibid.*)

(*Id.* at p. 738.)

Of course, the Drukteinis report would not have been the only evidence of appellant's incompetence before the trial court. There was more. The trial court was aware, from pleadings related to appellant's pretrial motion that he not be shackled, that, while appellant was incarcerated in New Hampshire, he was "disruptive and uncooperative with jail authorities there, refusing to dress," and that he had appeared in court in New Hampshire wrapped in a blanket. (CT 618). The court was also aware that appellant had made pretrial statements explaining his defense to murder charges on the basis of bizarre notions, including that he had incorporated and therefore enjoyed corporate immunity from prosecution for his shooting of Officer Mobilio. (3 RT 664; 1 CT 76.) Finally, in the guilt phase, appellant sought to defend against the charge of special circumstance murder on the ground that he was acting in "defense of liberty." Appellant believed that this defense gave him the right to shoot a police officer who was refueling his car. (10 CT 2355-2390. [Appellant's Memo. "Re Admissibility Of Defense, With Accompanying Proposed Order"].) When the trial court precluded appellant from introducing evidence in support of this defense, appellant became extremely emotional. (8 RT 1830.) Appellant

then told the court that "I intend to sit in silent protest during the guilt phase, and I will not speak or raise any issues until the penalty phase." (*Id.*)

Had Reichle performed competently, all of this evidence would have been supplemented by the Drukteinis report which "connected the dots." That is, the report identified that appellant was suffering from a delusional disorder characterized by irrational thinking.

In sum, the foregoing authority establishes two points: (1) the Drukteinis report constituted substantial evidence of appellant's incompetence; and (2) had Reichle presented the Drukteinis report to the trial court, that court would have been required to hold a hearing on appellant's competency to waive counsel prior to permitting him to waive that right. Reichle's failure to present that report was therefore prejudicial.

The judgment should be reversed.

III. THE JUDGMENT OF DEATH MUST BE REVERSED BECAUSE THE TRIAL COURT VIOLATED DUE PROCESS WHEN IT FAILED TO SUSPEND CRIMINAL PROCEEDINGS AFTER RECEIVING CREDIBLE INFORMATION, PRIOR TO PRONOUNCING JUDGMENT, WHICH RAISED A DOUBT REGARDING APPELLANT'S COMPETENCE.

A. Summary of Argument

As explained in Argument I, above, prior to trial the court had sufficient evidence of appellant's incompetence requiring it to suspend proceedings under Penal Code section 1368. Even if this court were to find that the evidence of incompetence prior to trial was not substantial, the trial court became aware of substantial evidence of appellant's incompetence prior to pronouncement of judgment. Still, however, the trial court failed to suspend proceedings. This deprived appellant of due process, and the judgment of death must therefore be reversed.

B. Relevant Facts

In his closing argument at the penalty phase, appellant asked the jury to "give me liberty ... or give me death." (10 RT 2295.) A little over an hour later, the jury returned a judgment of death. (13 CT 3579.)

On April 27, 2005, the trial court conducted proceedings on the statutory automatic motion to modify the verdict of death. (Penal Code §

190.4, subd. (e).) Prior to that proceeding, the court had received letters from family of both the victim and appellant. (See 13 CT 3627-3663.) However, the trial court believed that in deciding the the motion to modify, it was confined to considering the evidence before the jury. (10 RT 2346, 2351.) The court therefore did not review letters from appellant's family and friends until after it had ruled on the motion to modify the judgment of death. (10 RT 2351.) In denying the motion to modify, the court recited the various factors for its consideration. The court quoted one such factor: "Influence of extreme mental or emotional disturbance." (10 RT 2348.) After reciting this factor, the court stated, "There is none." (*Id.*)

After denying the motion to modify, the court recessed to read the probation report and the attached letters from friends and family of Officer Mobilio and appellant. (13 RT 2351.) The judge then returned to the bench and stated that he had reviewed the letters from the victim's family and those submitted on behalf of appellant. (13 RT 2353.)

Up until the time the court received those letters, the court did not have a complete picture of appellant's mental state. This was because appellant had succeeded in waiving his right to counsel and represented himself throughout the entire trial. Appellant, who, according to his mother's letter to the court in support of the motion to modify, did not wish to put his mental state in issue, was thus able to prevent the court and the jury from learning any information regarding his mental illness. (13 CT 3634.) Appellant was assisted in this

endeavor by his counsel, and later advisory counsel, James Reichle. Reichle, after all, had made a pretrial motion to prevent any disclosure of the Drukteinis psychiatric report, and had repeatedly insisted, without disclosing any evidence to the contrary, that appellant had the mental capacity to waive his right to counsel and represent himself. As a result, prior to receiving the letters from appellant's family and friends, the court had incomplete information regarding appellant's competence.

Before receiving the letters in connection with the motion to modify, the court knew the following about appellant's mental state:

1) Appellant had been examined by Dr. Drukteinis in connection with the New Hampshire extradition proceeding. Appellant told the court in relation to his motion for change of venue that after he was arrested in New Hampshire, "attorney Sisti, without Defendant's consent and against his express instructions, attempted to lay a foundation for an insanity defense, making dramatic, unsubstantiated claims that the Defendant could not even identify himself, could not understand the court proceedings, and could not understand the difference between the Judge, the Prosecution, and the Defense." (4 CT 864-865.)

2) In opposition to appellant's pretrial motion that he not be shackled, the district attorney informed the court that appellant

was "disruptive and uncooperative with jail authorities there [in New Hampshire], refusing to dress," and that he appeared in court in New Hampshire wrapped in a blanket. (CT 618). (CT 618).

3) Appellant made pretrial statements explaining his defense to murder charges on the basis of bizarre notions such as that he had incorporated and therefore enjoyed corporate immunity from prosecution, and that his actions were part of a "Declaration of Renewed American Independence." (8 CT 1992-1996.)

4) At trial, appellant permitted jurors to sit on his jury who stated they would automatically impose the death penalty for killing a police officer; he failed to cross-examine the majority of prosecution witnesses; he waived any instruction on lesser included offenses; and he sought to defend against the charge of special -circumstance murder on the ground that he was acting in "defense of liberty." (10 CT 2355-2390. [Appellant's brief "Re Admissibility Of Defense, With Accompanying Proposed Order"].) When the trial court precluded appellant from introducing evidence in support of this defense, appellant became extremely emotional. (8 RT 1830.) He then told the court that "I intend to sit in silent protest during the guilt phase, and I will not speak or raise any issues until the penalty phase." *(Id.)*

5) Appellant gave rambling testimony at the penalty phase in which

> he explained his conduct by reference to the Revolutionary War, the Declaration of Independence, the Shot Heard Round the World, John Hancock, Sam Adams, the Battle of Lexington, the Federalist Papers, the Israeli-Palestinian conflict, the Patriot Act, the development of a professional police force, and the extent of government surveillance of its citizens. (9 RT 2049-2096.) Appellant's testimony prompted one juror to ask the court, "Was Mr. Mickel on drugs?" (10 CT 2599.)

The letters from appellant's family provided the trial court with a great deal more information about appellant's mental illness. The letter from appellant's mother, Karen Mickel, informed the court that appellant had a difficult birth, "taking a long time to breathe." (13 CT 3634.) Mrs. Mickel took appellant to a counselor at age four. He was "medicated for depression for much of his teenage years." (*Id.*) Two psychiatrists who examined appellant after the crime told Mrs. Mickel that appellant was suffering from psychosis. One psychiatrist told her that he needed more time to evaluate the particular form of psychosis, but that when appellant took over his own defense, appellant did not not permit him to continue with his diagnosis. (*Id.*) Mrs. Mickel concluded that "my son has mental illness." (13 CT 3635.)

Appellant's brother, Patrick Mickel, told the court that "my brother is crazy." (13 CT 3637.) Shortly after appellant killed Officer Mobilio, appellant called Patrick. Appellant told Patrick that "he had met God and met the Devil,

and that God had told him to do this. He said that God told him, "The law is in your hands," and then went on to explain the implications of this 'message' from god, about how God endorsed this course of action." (*Id.*). Patrick concluded that appellant was "a very sick young man." (*Id.*)

Mary Patton, a family friend since 1975, told the court that appellant was "a very confused and disturbed young man" who had been "treated by a number of psychologists since he was a young child." (13 CT 3639.) According to Patton, appellant's intelligence masked his "emotionally fragile and psychologically unstable nature." (*Id.*)

Benjamin Poston, a man who had known appellant since the third grade, told the court that appellant was "a mentally sick person who cannot differentiate between reality and a fictional world that he has invented." (13 CT 3644.) Another lifelong friend, Sarah Patton, echoed this sentiment, noting that appellant had changed dramatically from his childhood years, and appeared to be mentally ill. (13 CT 3650.) Long-time friend, Tobias Smith, told the court that appellant "suffered from manic-depression," and that from 2002 onwards, appellant's behavior was "increasingly troubling, and suicidal. (13 CT 3655-3666.)

These letters, from appellant's family and closest friends, including the information that two psychiatrists had detected psychosis, provided the court with abundant information regarding appellant's mental derangement and

delusions.

After reading these letters, the court returned to the bench. It asked appellant if he waived arraignment for judgment. (13 RT 2353.) Appellant did. (*Id.*) The court asked if there was any "legal cause why the Court should not now pronounce judgment?" (*Id.*) Appellant replied that "I don't have any legal issues, Your Honor." (*Id.*) The court explained to appellant that "legal cause" included issues of insanity, and any motion for new trial. (13 RT 2354.) Appellant stated he had no such issues to present.

Despite the information the court then had in its possession, both from the trial itself and from the letters described above, the trial court did not declare a doubt as to appellant's competence or revoke his right to self-representation. Instead, the court sentenced appellant to death. (13 RT 2356-2357.)

As explained below, the court's failure to express a doubt as to appellant's competence and suspend criminal proceedings prior to judgment, or at a minimum, revoke appellant's right to represent himself, violated due process and requires reversal of the judgment.

C. A Criminal Defendant Has A Due Process Right To Procedures Adequate To Ensure He Will Not Be Sentenced While Mentally Incompetent.

As explained above in Argument I, the trial and conviction of a defendant who is legally incompetent violates a defendant's right to due process of law. (*Pate v. Robinson* (1966) 383 U.S. 375, 378.) The due process prohibition on proceedings against an incompetent defendant extends not only to trial, but to sentencing.

Thus, Penal Code section 1367 provides that "[a] person cannot be tried *or adjudged to punishment* while that person is mentally incompetent." (Emphasis added. See *People v. Lawley* (2002) 27 Cal.4th 102, 136 ["When, at any time prior to judgment, a trial court is presented with substantial evidence of a defendant's incompetence to stand trial, due process requires a full competency hearing."]; *People v. Wade* (1959) 53 Cal.2d 322, 335 ["Penal Code section 1368 provides for a hearing on the present sanity of a defendant if, at any time before judgment, the judge entertains a doubt as to that sanity."]; *People v. Jones* (1991) 53 Cal.3d 1115, 1152-1153 ["The court's duty to conduct a competency hearing arises when such evidence is presented at any time "prior to judgment."]. Accord, *United States v. Garrett*, (7th Cir. 1990) 903 F.2d 1105, 1115 ["need for competency also extends beyond trial to the sentencing phase of a proceeding"]; *Saddler v. United States* (2d Cir.1976) 531 F.2d 83, 86 [a "court should not proceed with sentence unless the defendant is mentally competent."]; *United States v. DeLuca* (S.D.N.Y.1982) 529 F.Supp. 351, 356 ["If the Court had sentenced defendant in spite of his incompetence the sentence would clearly have been invalid"].)

Blackstone explained the rationale for this rule: "If, after he be tried

and found guilty, he loses his senses before judgment, judgment shall not be pronounced ... for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution." (4 William Blackstone, Commentaries *24-25.) The rationale – that a competent defendant "might have alleged something in stay of judgment" – has particular force where the defendant is representing himself. If a defendant is not competent, by definition he is unable "to conduct his own defense in a rational manner. [Citations.]" (*People v. Merkouris*, *supra*, 52 Cal.2d at p. 678.) In such a case in which a incompetent defendant is representing himself, he is left without a rational advocate representing his interests before the court. This is tantamount to having no advocate at all. As the Supreme Court explained in *Indiana v. Edwards* (2008) 554 U.S. 164, "Moreover, insofar as a defendant's 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." (*Id.* at pp. 176-177.)

That was precisely what happened here.

D. Prior To Pronouncing Judgment, The Trial Court Had Substantial Evidence That Raised A Doubt As To Appellant's Competency, Which Required The Court To Suspend Criminal Proceedings.

After the trial court reviewed the sentencing letters from appellant's family and friends, the court had information that two psychiatrists had stated that appellant suffered from psychosis, that he had a history of mental illness, dating back to his teenage years, and that he suffered from delusions including

that he had been commanded by god to commit the crime for which he was convicted.

This sort of evidence, contained in a presentence report, has been held sufficient to raise a doubt as to a defendant's competence and require the suspension of criminal proceedings. *McMurtrey v. Ryan* (9th Cir. 2008) 539 F.3d 1112, 1123; *Moore v. United States* (9th Cir.1972) 464 F.2d 663, 666; *Morris v. United States* (9th Cir.1969) 414 F.2d 258, 259.) Information contained in presentence reports may be considered because "substantial evidence" is a term of art that "encompasses all information properly before the court, whether it is in the form of testimony or exhibits formally admitted or it is in the form of medical reports or other kinds of reports that have been filed with the court." (*Moore v. United States, supra,* 464 F.2d 663, 666.)

Here, the trial court learned during trial that appellant had been found incompetent by Dr. Drukteinis months before trial began. With the presentence report, the court learned that appellant had been found to suffer from psychosis by a second psychiatrist. Of course, the report of a single psychiatrist constitutes substantial evidence requiring suspension of the proceedings. (*People v. Pennington*, *supra*, 66 Cal.2d at p. 519; *People v. Welch, supra*, 20 Cal.4th at p. 738.) Here, the court had information from *two* psychiatrists casting doubt on appellant's competence. But, that was not all the court learned from the presentence letters. The court also learned that appellant suffered from delusions, which taken together with his trial defense and penalty phase testimony likening a police officer refueling his car to a Red Coat occupying an American Colony, raised further doubts as to appellant's ability to rationally conduct his own defense.

Faced with this information prior to sentencing, the trial court's statement moments earlier that there was no evidence of "extreme mental or emotional disturbance" rings hollow indeed. The Ninth Circuit has observed that,

> [i]n cases finding sufficient evidence of incompetency, the petitioners have been able to show either extremely erratic and irrational behavior during the course of the trial, e.g., *Tillery v. Eyman*, 492 F.2d 1056, 1057-58 (9th Cir.1974) (defendant screamed throughout the nights, laughed at the jury, made gestures at the bailiff, disrobed in the courtroom and butted his head through a glass window), or lengthy histories of acute psychosis and psychiatric treatment, e.g., *Moore v. United States*, 464 F.2d 663, 665 (9th Cir.1972) (defendant repeatedly hospitalized for acute mental illness and hallucinations).

(*Boag v.Raines* (9th Cir. 1985) 769 F.2d 1341, 1343.) In the instant case, appellant displayed *both* irrational behavior in the courtroom *and* had a history of mental illness. As to his irrational behavior, the court learned that in New Hampshire, appellant refused to dress and appeared in court in a blanket. He vowed to remain silent when the trial court denied his motion to defend the case on the basis of a non-existent "defense of liberty." And he gave testimony at the penalty phase that prompted one juror to ask whether "Mr. Mickel was on drugs." (10 CT 2599.) Added to this was appellant's history of mental illness, illuminated by the presentence letters and the Drukteinis report.

Taken together, this information should have prompted the trial to suspend proceedings under Penal Code section 1368. Its failure to do so denied appellant due process, and requires reversal of the judgment. (*People*

v. Ary (2011) 54 Cal.4th 510, 515, fn. 1; *People v. Young* (2005) 34 Cal.4th 1149, 1217 [when "a full competence hearing is required but the trial court fails to hold one, the judgment must be reversed "].)

In sum, the trial court's failure to make a finding as to appellant's competency to be sentenced rendered it without jurisdiction to impose sentence. Consequently, appellant's sentence of death must be vacated and appellant must be remanded to the trial court for a finding of competency to be sentenced. (*People v. Marks* (1988) 45 Cal.3d 1335, 1337; *Drope v. Missouri*, *supra*, 420 U.S. at 183 [given the inherent difficulties and inadequacy of a nunc pro tunc determination of competency, reversal is required].)

ISSUES RELATED TO SELF-REPRESENTATION

IV. APPELLANT'S CONVICTION MUST BE REVERSED BECAUSE THE TRIAL COURT VIOLATED PENAL CODE SECTION 686.1 BY PERMITTING APPELLANT TO WAIVE COUNSEL WITHOUT ASSESSING WHETHER HE WAS COMPETENT TO CONDUCT HIS OWN TRIAL DEFENSE.

A. Summary of Argument

Penal Code section 686.1 provides that "a defendant in a capital case shall be represented in court by counsel at all stages of the preliminary and trial proceedings." The language and intent of the statute could not be clearer: proceedings leading up to the imposition of the extreme sanction of death must be reliable; and reliability, in the Legislature's judgment, requires that the defendant be represented by counsel. As Justice Chin has pointed out, the statute represents "the legislatively stated policy ... of this state." (*People v. Dent* (2003) 30 Cal.4th 213, 224 [conc. opn. of Chin, J.].)

To this day, however, California courts have ignored this legislative mandate, believing that implementation of the statute is blocked by the line of United States Supreme Court cases beginning with *Faretta v. California* (1975) 422 U.S. 806, which held that a defendant who has the capacity to waive the right to counsel, and does so, is entitled to represent himself. The courts of this state have interpreted the right established by *Faretta* as being "absolute." (*People v. Taylor* (2009) 47 Cal.4th 850, 872 ["In the wake of *Faretta's* strong constitutional statement, California courts tended to view the federal self-representation right as absolute, assuming a valid waiver of

counsel. [Citations.]"]; *People v. Clark* (1990) 50 Cal.3d 583, 618, fn. 26.)

The matter, however, is not nearly so simple. That is because, in cases decided after *Faretta*, including *Godinez v. Moran* (1993) 509 U.S. 389, the United States Supreme Court stated that the right was in fact not absolute. And in *Indiana v. Edwards,* the Supreme Count confirmed that, without running afoul of *Faretta,* the states may impose requirements beyond the mere capacity to waive the right to counsel, before permitting a defendant to represent himself at trial.

United States Supreme Court caselaw has thus permitted California to take steps to implement the policy, embodied in Penal Code section 686.1, of requiring that capital defendants be represented by counsel to the maximum extent permitted by the Sixth Amendment.

That California policy, by requiring counsel in *all* capital cases, necessarily includes a policy of not permitting self-representation unless the defendant can meet the most stringent standard of proof permitted by the federal Constitution. Put otherwise, federal law may preclude California from enforcing its literal statutory requirement of counsel in *all* capital cases; but vindication of the State's policy *a fortiori* requires counsel in *the greatest number* of capital cases that federal law would allow.

In Mr. Mickel's case, the trial court erroneously believed that, notwithstanding Penal Code section 686.1, if Mr. Mickel had the capacity to

waive his right to counsel, his right to represent himself was absolute. (2 RT 254.) But as *Edwards* makes clear, the State retains latitude to require the defendant to make an additional showing beyond the mere capacity to waive the right to counsel. Prior to *Faretta*, California required such an additional showing. Thus, while this court held that "the defendant's right to represent himself cannot be denied simply because he is unable to 'demonstrate either the acumen or the learning of a skilled lawyer,' (*People v. Harmon* (1960) 54 Cal.2d 9, 15; *People v. Linden* (1959) 52 Cal.2d 1, 18)," the court nonetheless required that a defendant wishing to waive counsel and represent himself show a modicum of defense skills, including that he "understands the nature of the offense, the available pleas and defenses, and the possible punishments." (*In re Johnson* (1965) 62 Cal.2d 325, 335.)

Gocinez v. Moran and Indiana *v. Edwards* confirm that California's insistence on this minimal level of trial skill is entirely consistent with the Sixth Amendment.

In Mr. Mickel's case, the trial court did not probe at all whether Mr. Mickel possessed this level of trial skill. In fact, he did not. The result was that Mr. Mickel insisted on defending the case on grounds that did not exist: that the "defense of liberty," grounded in the Declaration of Independence and the Second and Ninth Amendments, gave him the right to shoot peace officers of the State. When the trial court prohibited Mr. Mickel from defending the case on that basis, he became emotionally distraught, put on no defense at all, told the jury to find him guilty and asked for the death penalty. As appellant

has described in Argument I, above, the trial court was aware from multiple sources that appellant's competence to stand trial – much less his ability to understand the charges and relevant defenses – was highly questionable.

Mr. Mickel's trial was precisely the sort of capital proceeding that Penal Code section 686.1 was intended to prevent. The case should be reversed and the remanded for further proceedings consistent with state law.

B. Relevant Facts

As described above, on February 4, 2003, Mr. Mickel moved to represent himself. At that hearing, after posing a few questions to Mr. Mickel, the court observed that Mr. Mickel did not "demonstrate a very sophisticated or, for that matter, any grasp of the law." (1 RT 11.) Mr. Mickel then agreed to permit counsel to represent him at the preliminary examination. (1 RT 14.) James Reichle was appointed to do so. (2 CT 500.)

On April 7, 2003, Mr. Reichle filed a "Motion Re Participation In the Proceedings," (3 CT 561-565), in which he asked the court to permit Mr. Mickel to "personally address the Court in order to explain the legal basis and nature of his affirmative defense." (3 CT 562.)

While Mr. Reichle did not elaborate on the "legal basis and nature of the affirmative defense" Mr. Mickel intended to present to the court, both the court and the parties were well aware of it. This is because the record prior to Mr. Reichle's April 7, 2003 motion was replete with appellant's own

description of the crime and his stated legal justification for it. Thus, the court was aware that appellant had characterized the shooting a "political action, and publicly admitted in internet postings that he committed the killing, explaining the following:

> "Hello Everyone, my name's Andy. I killed a Police Officer in Red Bluff, California in a motion to bring attention to, and halt the police-state tactics that have come to be used throughout our country. Now I'm coming forward to explain that this killing was also an action against corporate irresponsibility."

(1 CT 1A; 1 CT 42-46 [full text of appellant's internet posting entitled "Proud and Insolent Youth Incorporated,"]; 47-81.)

Finally, the court was aware that Mr. Mickel premised his defense to murder on the "Right of Revolution" contained in the New Hampshire Constitution, despite the fact that this was a California crime.. (1 CT 45.) Mr. Mickel quoted that right of revolution in the internet posting in which he took credit for the murder:

> "Government being instituted for the common benefit, protection, and security of the whole community, and not for the private interest or emolument of any one man, family, or class of men; therefore, whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought to reform the old, or establish a new government. The doctrine of nonresistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind. "

(1 CT 45.)

Appellant was arraigned on February 25, 2003. After reviewing the complaint, the court asked Mr. Mickel what his plea would be. Mr. Mickel responded:

> "Your Honor, I admit that I committed the act that resulted in Officer Mobilio's death. However, in order to gain the opportunity to represent to a jury that this was a valid, justified action, I plead not guilty."

(1 RT 23.)

On April 22, 2003, the trial court conducted a hearing on appellant's motion to address the court at the preliminary hearing to explain his affirmative defense. (1 RT 55 et seq.) Reichle told the court that appellant "admitted doing the act, and he believes he has a defensive justification, and simply what he wants to do is describe to the Court what that justification is." (1 RT 57.) Concerned with pretrial publicity, the court then asked Reichle "what could be more prejudicial to the Defendant than my allowing him to stand up and make a half-hour statement in which he sets forth his philosophical or legal justification for killing a police officer?" (1 RT 59.) Reichle responded that what appellant wanted to put forward was "a theory of law and Constitutional law ...." (1 RT 60-61.) Reichle candidly conceded that

> "[t]here is obviously no case or no jury instruction for a justification in this case. But I think it is a legitimate inference from the Constitution as to what he is claiming, whether you agree or not." (1 RT 62.)

While the court was prepared to permit Mr. Mickel to testify at the

preliminary hearing, the court denied the motion to permit Mr. Mickel to explain his affirmative defense at the preliminary hearing in a way that would give him a "soap box, to stand up and state ... that which he believes to be the facts of the case." (1 RT 66.)

The court's concerns could only have been compounded when, at the same hearing, Reichle moved to seal materials from the New Hampshire proceedings, including a psychiatric report that Reichle called "inflammatory" (3 CT 643B-C; 1 RT 68.)

The preliminary examination was held on May 21, 2003, after which Mr. Mickel was held to answer. (3 CT 672; 1 RT 221-222.)

After being held to answer, Mr. Mickel renewed his motion for self-representation. On November 24, 2003, Mr. Mickel filed a brief in support of his motion. (3 CT 751-765.) Though coherently written, the brief hinted at Mr. Mickel's complete lack of understanding of the charged crime and the potential defenses, and at his major mental illness. Thus, Mr. Mickel stated that he be assisted by advisory counsel for the following reason:

> "In this case the prosecution's case is relatively simply [sic] and straightforward, especially with Defendant willing to admit the bulk of, if not all of, the facts that the prosecution intends to present. Whereas, the defense's case is an affirmative one and extremely complex. Furthermore, it is anticipated that with the theoretical overview of *the defense being alien to the District Attorney*, the prosecution will challenge very nearly all the

> evidence that Defendant intends to present, to a greater extent and diligence than the average defense would undergo. Indeed, the theories and evidence of the defense are quite sensitive in the manner in which they can be misportrayed as to relevance at trial."

(3 CT 760 [emphasis added].)

For his part, on November 20, 2003, Mr. Reichle filed a brief in support of appellant's motion for self-representation. (3 CT 738-746.) Mr. Reichle also hinted at the bizarre nature of the defense Mr. Mickel intended to offer:

> "This capital case presents a unique factual situation. The Defendant has publicly admitted committing the acts that underlie the charged murder of a law enforcement officer, while articulating the justification and necessity of the acts in the nature of an affirmative defense. The focus of this case is that defense. Defendant has determined, after careful deliberation, that he can adequately present his case to the jury only if he himself controls and conducts that presentation."

(3 RT 740.)

The trial court heard Mr. Mickel's motion for self-representation on December 8, 2003. (2 RT 245 et seq.) As described in Argument I, *supra*, the court questioned Mr. Mickel on the acknowledgments he made on the *Faretta* waiver form. (3 CT 788 [waiver form]; 2 RT 246-250. See Argument VI, below.) The court did not question Mr. Mickel to determine whether he understood the charges, the elements or the defenses to such charges, as this

court had required in cases decided prior to *Faretta*. (*In re Johnson*, *supra*, 62 Cal.2d at p. 335.) Based on its determination that appellant's waiver was knowing and intelligent, as required by *Faretta*, the court granted the motion for self-representation. As the court explained,

> "The Court at this time recognizes the Defendant's right under *Faretta* to represent himself. Whether or not the Court believes that is a wise or an appropriate decision, it appears to the Court that the Defendant's waiver to right of counsel is knowing, intelligent, express and explicit, and that therefore he is entitled to make that decision. The Court will at this time permit the Defendant to represent himself."

(2 RT 254.)

C. The Trial Court Violated State Law By Permitting Mr. Mickel To Represent Himself Without First Determining Whether He Was Competent To Conduct His Own Defense, Including Whether He Understood the Nature Of The Charges And The Applicable Defenses.

In order to understand the competency standards for a waiver of counsel in California, it is necessary to explore how those standards of competency have evolved under the United States Supreme Court's jurisprudence. In *People v. Taylor* (2009) 47 Cal.4th 850, this court reviewed the evolution of those competency standards, and appellant will therefore only briefly review that history here.

Faretta, of course, held that defendant has a Sixth Amendment right to conduct his own defense, provided that he knowingly and intelligently waives his constitutional right to counsel. (*Faretta*, *supra*, 422 U.S. at pp. 835-836.)

Faretta did not articulate a standard for determination of competency to waive the right to counsel. However, "the court made clear, on the one hand, that the defendant's waiver of counsel must be undertaken voluntarily and 'with eyes open,' to the disadvantages of self-representation [citation], and, on the other, that the defendant's 'technical legal knowledge" was irrelevant to the exercise of the right." (*Taylor*, *supra*, 47 Cal.4th at p. 872.)

As *Taylor* noted, in the wake of *Faretta*, California courts "tended to view the federal self-representation right as absolute, assuming a valid waiver of counsel." (*Ibid.*) As one appellate court put it, "The sole issue to be determined in a *Faretta* hearing is whether the defendant had the mental capacity to waive his constitutional right to counsel with a realization of the probable risks and consequences of his action. Whether or not a defendant is competent to act as his own lawyer is irrelevant." (*People v. Zatko* (1978) 80 Cal.App.3d 534, 544, quoted in *Taylor*, *supra*, 47 Cal.4th at p. 873.)

The United States Supreme Court affirmed this principle in *Godinez v. Moran* (1993) 509 U.S. 389, where it held that the standard for competence to waive the right to counsel is no different from the standard for competence to stand trial established in *Dusky v. United States* (1960) 362 U.S. 402, *i.e.*, whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as a factual understanding of the proceedings against him." (*Ibid.*) After *Godinez*, it was thus understood that a defendant who was competent to stand trial ("trial competence") was *ipso facto* competent to

waive the right to counsel. (*People v. Taylor, supra*, 47 Cal.4th at p.874.) The rationale was simply that "the competence that is required of a defendant seeking to waive his right to counsel is the competence to waive the right, not the competence to represent himself." (*Godinez*, 509 U.S. at p. 399; *Taylor*, 47 Cal.4th at p.874.)

Godinez advised, however, that although the states "are free to adopt competency standards that are more elaborate than the *Dusky* formulation, the Due Process Clause does not impose these additional requirements." (*Godinez, supra*, 509 U.S. at p. 402.)

Following *Godinez*, in a series of non-capital cases, the California appellate courts held that "under *Godinez* no greater degree of competence was required for self-representation than for standing trial." (*Taylor*, 47 Cal.4th at p. 874) There matters stood until in *Indiana v. Edwards, supra,* 554 U.S. 164, the Supreme Court revisited its suggestion in *Godinez* that states could adopt "more elaborate standards" than mere trial competence before permitting a defendant to represent himself at trial.

In *Edwards*, a defendant with a history of mental illness moved to represent himself. The trial court denied the motion for self-representation, finding that while the Edwards was competent to stand trial under the *Dusky* standard, he was not competent to defend himself. The Indiana Supreme Court reversed his conviction on the ground that *Faretta* imposed an absolute rule and thus *required* the state to permit Edwards to represent himself. The United

States Supreme Court reversed, holding that "the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." (*Indiana v. Edwards*, *supra*, 554 U.S. at p. 178.) This court observed that *Edwards* did not hold that the due process clause or the Sixth Amendment mandates a higher standard of competence for a defendant wishing to represent himself. Instead, it holds that "states may, without running afoul of *Faretta*, impose a higher standard...." (*Taylor*, 47 Cal.4th at p.877.)

In the wake of *Indiana v. Edwards*, this court considered in *People v. Taylor* whether the caselaw in California had established a higher standard of competence for self-representation than *Dusky's* simple trial competence. The defendant in *Taylor* was permitted to represent himself. On appeal, he claimed that the trial court had abused its discretion by failing to require a higher standard than trial competence before permitting him to waive the right to counsel. This court acknowledged that *Indiana v. Edwards* permitted states to require a defendant, who moves to represent himself, to meet a higher standard of competency than established by *Dusky*. (*Taylor*, *supra*, 47 Cal.4th at pp.877-878.)[7] Accordingly, as this court was later to summarize, "a *Faretta*

---

[7] *Taylor* justified the holding in the following way: "In its recognition of the very different capacities needed to assist defense counsel and to act as one's own counsel, the *Edwards* court echoes the *Godinez* dissent's critique of equating competence to stand trial with competence to represent oneself: "A person who is 'competent' to play basketball is not thereby 'competent' to play the violin." (*Godinez*, *supra*, 509 U.S. at p. 413, (dis. opn. of Blackmun, J.).)

motion may be denied if the defendant is not competent to represent himself (*Indiana v. Edwards*, at p. ----, 128 S.Ct. at p. 2388)...." (*People v. Lynch* (2010) 50 Cal.4th 693, 721.)

Despite acknowledging that California was free to employ a heightened competency limitation on waivers of the right to counsel, *Taylor* rejected the defendant's claim that the trial court erred in permitting Taylor to represent himself. This was because "at the time [of Taylor's 1996 trial] ... state law provided the trial court with no test of mental competence to apply other than the *Dusky* standard of competence to stand trial" and "definitive federal case law rejected the idea that 'competence to ... waive the right to counsel must be measured by a standard that is higher than (or even different from) the *Dusky* standard [.]'" (*Taylor, supra*, 47 Cal.4th at pp. 879-880.)

In reaching this conclusion in *Taylor,* this court did not consider, and therefore did not rule on, whether two sources of California law in fact provided for a higher level of competence than the *Dusky* standard. First, the court did not consider the numerous cases decided by this court prior to *Faretta,* holding that a valid waiver of counsel requires the following:

> "In order for a trial judge to determine whether there has been a competent and intelligent waiver of counsel, he must first ascertain whether the defendant clearly understands the nature and effect of his waiver." More particularly, "the court cannot accept a waiver of counsel from anyone accused of a serious public offense without first determining that he '***understands the nature of the charge, the elements of the offense, the pleas and***

> ***defenses which may be available***, or the punishments which may be exacted.' (*In re James* (1952) 38 Cal.2d 302, 313.)"

(*In re Johnson* (1965) 62 Cal.2d 325, 335 [emphasis added].)

This court's decision in *Johnson* was not a solitary holding, but rather one in a long line of cases expressly holding that a defendant seeking to represent himself must demonstrate an understanding of the "nature of the charge, the elements of the offense," and the "defenses which may be available." (*People v. Floyd* (1970) 1 Cal.3d 694, 703; *People v. Williams* (1970) 2 Cal.3d 894, 908; *People v. Kellett* (1969) 1 Cal.App.3d 704, 709-710; *People v. Addison* (1967) 256 Cal.App.2d 18, 23; *Ex parte James* (1952) 38 Cal.2d 302.); *People v. Chesser* (1947) 29 Cal.2d 815.) According to this court, "[t]he inquiry into the defendant's ability to defend himself fulfills a two-fold purpose. It serves not only to determine his competence, but also to alert him to the seriousness of the action he contemplates as well as the pitfalls he may expect to encounter."[Citation.]." (*People v. Williams*, *supra*, 2 Cal.3d at p. 990.) *Williams* noted that "[t]he scope of the inquiry will, of course, vary according to the seriousness of the crime charged...." (*Id.*)

Prior to *Faretta,* in cases in which the trial court failed to determine that the defendant seeking to waive counsel fully understood the "nature of the charge, the elements of the offense," and the "defenses which may be available," this court did not hesitate to find a violation of the right to counsel, and reverse the conviction.

Thus, for example, in *Ex Parte James*, *supra*, 38 Cal.2d 302, the defendant was charged with first-degree murder. Before counsel was appointed for him, James told the court he wanted to plead guilty. Without determining whether the defendant understood the charges or applicable defenses, the court accepted his waiver of counsel and guilty plea and sentenced him to life in prison. (*Id.* at pp. 308-309.) On a writ of coram nobis, this court vacated his sentence. The court reasoned that, "[a]s the seriousness of the charge increases, a purported waiver must be scrutinized with corresponding care. If a capital crime is charged, as herein, the mere statement that the accused wishes to plead guilty is not enough to show a waiver of the constitutional guarantee. Moreover, the court cannot accept a waiver of counsel from anyone accused of a serious public offense without first determining that he 'understands the nature of the charge, the elements of the offense, the pleas and defenses which may be available, or the punishments which may be exacted.'" The record did not meet this minimum requirement. The record indicated that the court failed to "inform him of the possible maximum penalty or of the possibility of there being different degrees of the crime charged." This court explained that

> The defendant, who was illiterate and had no previous encounters with the law or experience in the intricacies of criminal procedure, "could hardly be expected to comprehend the possible offenses and various punishments involved in this homicide or to know how to weigh, let alone present, the defenses available thereto. The 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."

(*Id.* at pp. 311-312.)

People v. Chesser, supra, 29 Cal.2d 815, is to the same effect. Chesser was charged with capital murder. Prior to trial, the defendant appeared without counsel, waived the right to counsel and pleaded guilty. On appeal, this court held that the record failed to demonstrate that the waiver of counsel was knowing and intelligent. The court explained;

> In order for a trial judge to determine whether there has been a competent and intelligent waiver of counsel, he must first ascertain whether the defendant clearly understands the nature and effect of his waiver. In a capital case where the defendant has not had the benefit of advice of counsel, and there is nothing to indicate that he understands the nature of the charge, the elements of the offense, the pleas and defenses which may be available, or the punishments which may be exacted, the trial judge does not sufficiently perform his duty if he merely advises the defendant that he has a right to counsel and that the death penalty may be imposed.

(*Id.* at p. 822.)

This court found in *Chesser* that there was "nothing in the record which indicates that defendant had the slightest conception of the elements of the different offenses included in the charge, the available defenses, or the different punishments involved. Apparently all he knew was that the death sentence could be invoked and that he felt he should pay the extreme penalty for what he had done. He obviously did not understand that he could not be found guilty of murder of the second degree unless he caused the death of his baby "with malice aforethought," and that under the circumstances of this case

he would not be guilty of murder of the first degree unless the killing were 'willful, deliberate and premeditated.'" (*Id.* at p. 823.) Accordingly, the court reversed the conviction.

This court's own opinions thus clearly established that, at the time of Mr. Mickel's trial in 2003, *at a minimum* a valid waiver required the court to determine whether he understood the nature of the charges and the available defenses to those charges.

While such requirements may have been viewed as inconsistent with *Faretta* itself, (see *People v. Taylor*, *supra*, 47 Cal.4th at p. 872, fn. 9), the Supreme Court's decision in *Godinez v. Moran* clearly permitted states to adopt "competency standards that are more elaborate than the *Dusky* formulation." (*Godinez*, *supra*, 509 U.S. at p. 402.) California of course had a more elaborate standard in place, commencing with *In re Johnson*, *supra*, 62 Cal.2d 325, and federal law did not therefore prevent the trial courts from applying that standard.[8]

---

[8] Not surprisingly, in the wake of *Indiana v. Edwards*, many states have required that a waiver of counsel not only establish that the defendant had the capacity to waive the right to counsel, but that he also had the capacity to conduct a defense at trial. (*State v. Jason* (Iowa App. 2009) 779 N.W.2d 66, 75-76; *State v. Connor* (Conn. 2009) 973 A.2d 627, 656; *State v. Lane* (N.C. 2008) 707 S.E.2d 210, 219; *State v. McNeil* (N.J.Super. 2009) 963 A.2d 358; *State v. Lewis* (Neb. 2010) 785 N.W.2d 834, 841. Accord, *United States v. Ferguson* (9th Cir. 2009) 560 F.3d 1060, 1069-1070.)

There was, moreover, a second source of law in California requiring trial courts to insist on a heightened standard of competency: California statutory law, which required counsel in all capital cases, and implicitly required that in a capital case, the courts apply the most stringent standards of competency consistent with federal law. This is the necessary implication of the legislative mandate appearing in Penal Code section 686.1, requiring that "a defendant in a capital case shall be represented in court by counsel at all stages of the preliminary and trial proceedings."

This statute was adopted in 1972, pursuant to a constitutional amendment. Prior to 1972, the California Constitution, article 1, section 13, guaranteed the right of a criminal defendant to represent himself. (See generally *People v. Sharp* (1972) 7 Cal.3d 488, 463 [Appendix]; *People v. Dent, supra,* 30 Cal.4th at p. 223 [conc. opn. of J. Chin].) Thus, in order to enact legislation requiring counsel in certain cases, the constitution had to be amended. The Legislature passed such a constitutional amendment in 1971, deleting the right to self-representation from article 1, section 13. That constitutional amendment was then put to the voters in 1972 as Proposition 3. The Voter Pamphlet accompanying that amendment explained that such a change was necessary to ensure the defendant's right to a fair trial. The pamphlet stated that the amendment was "necessary in order to ensure the defendant is fairly advised of his rights during the trial," and to ensure "a fair trial for every defendant." (Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Primary Elec. (June 6, 1972) p. 8.) The ballot pamphlet further explained that "Today's complex legal system leaves no room

for the person unschooled in law and criminal procedure. Studies show that the person who represents himself in a serious criminal case is unable to defend himself adequately." (*Id.*) Requiring counsel in felony cases was said to "benefit the defendant, the courts and the people in general." (*Id.*)

The legislative intent behind the constitutional amendment and the accompanying statutes was clear: the amendments and statutes were premised on the legislative intent to ensure the reliability of criminal judgments, particularly in capital cases. (See *People v. Chadd* (1981) 28 Cal.3d 739, 750 [noting that Legislature's revisions of the death penalty laws in the 1973 session "was an effort to eliminate the arbitrariness that *Furman* [*v. Georgia*] found inherent in the operation of death penalty legislation."].)

The role of the courts is, of course, to "ascertain the intent of the Legislature so as to effectuate the purpose of the law." (*Phelps v. Stostad* (1997) 16 Cal.4th 23, 32; *DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387-388,) This task is aided by the rule "that the objective sought to be achieved by a statute as well as the evil to be prevented is of prime consideration in its interpretation." (*Wotton v. Bush* (1953) 41 Cal.2d 460, 466.) The legislative intent behind section 686.1 reflects the objects the legislature sought to avoid, and those it sought to enhance: First, it sought to to prevent disorderly trials associated with litigants appearing *in propria persona.* Second, it sought to enhance the reliability of outcomes of trials, particularly in capital cases where the stakes are the greatest. In the Legislature's judgment, this latter objective of enhanced reliability is promoted

by the appointment of counsel in as many capital cases as legally possible.

In order to effectuate this clear legislative intent, it was (and is) incumbent on the courts to insist that defendants in capital cases be represented by counsel in the maximum number of cases consistent with federal law. This result is in fact required by the closely analogous severability doctrine. That doctrine provides that where the legislature regulates an entire class of cases, as it did in Penal Code section 686.1, and where the court holds that regulation unconstitutional with respect some portion of those cases, the court is required to determine whether the legislature intended to regulate the remaining cases, and if so, to give effect to that legislative intent. As this court has explained, the doctrine is intended to preserve the valid part of an enactment, if it can be severed from the invalid part. In deciding whether severability is proper,

> "[t]he final determination depends on whether the remainder ... is complete in itself and would have been adopted by the legislative body had the latter foreseen the partial invalidity of the statute ... or constitutes a completely operative expression of legislative intent ... [and is not] so connected with the rest of the statute as to be inseparable....' "

(*Gerkin v. Fair Political Practices Com.* (1993) 6 Cal.4th 707, 714; *Santa Barbara Sch. Dist. v. Superior Court* (1975) 13 Cal.3d 315, 331.)

In the instant case, despite the fact that the courts have held Penal Code section 686.1 invalid as a blanket prohibition on self-representation, the question remains whether this court may enforce that statute with respect to a narrow class of defendants, as contemplated by *Indiana v. Edwards*. In making this determination, this court must decide whether the legislature

would have adopted a standard of competence to waive counsel such that capital defendants would be represented in the maximum number of cases permitted by law. In view of the legislative history of section 686.1, it is clear that the legislature would have intended a result that maximizes representation in capital cases, in preference to a result that would have maximized self-representation in such cases.

To effectuate the legislative purpose behind Penal Code section 686.1, the courts are therefore obligated to insist on the highest standards of competency consistent with federal law. As noted above, prior to *Faretta*, California had such a standard – one which required the defendant wishing to represent himself to establish that he understood the nature of the charges and the available defenses. Given the command of section 686.1, the failure of a defendant to meet this threshold competency requirement permits the trial court to require that the defendant be represented by counsel.

In the instant case , prior to granting Mr. Mickel's *Faretta* motion, the trial court did not require Mr. Mickel to establish either that he understood the charges of capital murder, or that he understood the potential defenses to such a charge. Indeed, it was apparent from the record that Mr. Mickel simply did not understand the elements of malice murder, or the defenses thereto. Mr. Mickel told the court he was going to put on an unprecedented defense of justification. Mr. Mickel's internet diatribes, which were part of the record before the court, made clear exactly what the defense was: a defense based on corporate immunity

Mr. Reichle candidly told the court that "[t]here is obviously no case or no jury instruction for a justification in this case. But I think it is a legitimate inference from the Constitution as to what he is claiming, whether you agree or not." (1 RT 62.)

Suffice it to say that Mr. Mickel's defense of liberty, as a defense to an intentional killing of a peace officer, has never been recognized by a court of law. Had Mr. Mickel told the court that he intended to defend the capital case on the ground that "I have brown hair, and people with brown hair cannot be guilty of murder," the court could not legally have permitted Mr. Mickel to represent himself, for he would have failed to establish that he understood either the elements of the charged offense or the potential defenses to the charged offense. The instant case is no no different. Given Mr. Mickel's stated intent to rely on a non-existent "defense of liberty," the trial court was obligated to find that he did not understand the charges and defenses, and therefore did not have the competence to represent himself.[9]

Permitting Mr. Mickel to represent himself under these circumstances was therefore error under the caselaw (see *In re Johnson*, *supra*, 62 Cal.2d

---

[9] For example, Mr. Mickel did not even mention as an option a defense of unreasonable self-defense based on his delusions. Under the law at that time, such defense could have negated the premeditation required for first degree murder. (See *People v. Padilla* (2003) 103 Cal.App.4th 675, 679 [holding that murder based on defendant's hallucination may result in negation of premeditation].)

325), and under the mandatory language of Penal Code section 686.1.

This court's decision in *People v. Taylor* does not compel a contrary result. That is because *Taylor* did not consider the impact of Penal Code section 686.1 on the question whether a trial court was permitted to deny a *Faretta* motion on the basis of the line of cases including *In re Johnson*, and on the mandate of Penal Code section 686.1. "It is axiomatic that cases are not authority for propositions not considered." (*People v. Ault* (2004) 33 Cal.4th 1250, 1268, fn. 10.)

D. The Error, Depriving Appellant Of The Right To Counsel, Requires Reversal.

An error which results in the complete deprivation of counsel under state law requires automatic reversal. (*People v. Chesser, supra*, 29 Cal.2d 815 [reversing judgment without proof of prejudice where defendant's waiver of counsel did not meet state law requirement of an understanding of charges and defenses]; *People v. Carter* (1967) 66 Cal.2d 666, 672 [same]; *People v. Robles* (1970) 2 Cal.3d 205, 218-219. Accord, *Penson v. Ohio* (1988) 488 U.S. 75.)

In *Penson,* the Supreme Court held that an error resulting in the denial of counsel on direct appeal required automatic reversal. The court explained:

> Finally, it is important to emphasize that the denial of counsel in this case left petitioner completely without representation during the appellate court's actual decisional

> process. This is quite different from a case in which it is claimed that counsel's performance was ineffective. As we stated in *Strickland*, the "[a]ctual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." 466 U.S., at 692. Our decision in *United States v. Cronic*, likewise, makes clear that "[t]he presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial." 466 U.S., at 659 (footnote omitted). Similarly, *Chapman* recognizes that the right to counsel is "so basic to a fair trial that [its] infraction can never be treated as harmless error." 386 U.S., at 23, and n. 8. And more recently, in *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988), we stated that a pervasive denial of counsel casts such doubt on the fairness of the trial process, that it can never be considered harmless error. Because the fundamental importance of the assistance of counsel does not cease as the prosecutorial process moves from the trial to the appellate stage, see supra, at 352, the presumption of prejudice must extend as well to the denial of counsel on appeal.

(*Id.* at p. 88.) Every federal circuit to consider the issue has followed *Penson* in holding that an error resulting in the denial of counsel at trial is automatically reversible. (See *People v. Burgener* (2009) 46 Cal.4th 231, 244.)[10]

While this court has declined in *Burgener* to decide whether defects in *Faretta* advisements that fail to warn a defendant of the risks of proceeding without counsel are subject to harmless error, (*ibid.*), it is abundantly clear that

---

[10] *Burgener* noted that one circuit had applied harmless error analysis in a case in which an erroneous *Faretta* waiver denied counsel at sentencing. (*United States v. Crawford* (8th Cir. 2007) 487 F.3d 1101.) *Crawford*, however, limited its holding the facts before it, involving the deprivation of counsel at sentencing at which the trial court imposed an unauthorized sentence. (*Id.* at p. 1108.)

where the trial court fails to determine whether a defendant is competent to even waive fundamental constitutional rights, that reversal is automatic. (See *Pate v. Robinson* (1966) 383 U.S. 375, 385 [trial court's failure to make inquiry into defendant's competence deprived him of the right to a fair trial.].)

Moreover, as the Supreme Court has made it abundantly clear in *Penson v. Ohio,* reversal is required for an error that results in the deprivation of counsel at a critical stage, such as the trial itself. (*Mempha v. Rhay* (1967) 389 U.S. 128, 134 [holding that counsel "is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected," and deprivation of that right requires automatic reversal]; *United States v. Cronic* (1984) 466 U.S. 648, 658, fn. 25.

The judgment in the instant case must therefore be reversed.

V. THE JUDGMENT OF DEATH MUST BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY PERMITTED APPELLANT TO WAIVE COUNSEL AT THE PENALTY PHASE IN VIOLATION OF PENAL CODE § 686.1

A. Summary of Argument

As discussed in the previous argument, the Legislature has required that capital defendants "be represented in court by counsel at all stages of the preliminary and trial proceedings." (Pen. Code § 686.1.) This statute remains the law in California, though California courts have believed they were prohibited by *Faretta v. California* from enforcing it. *Indiana v. Edwards, supra*, 554 U.S. 164, and *Martinez v. Court of Appeal* (2000) 528 U.S. 152 , however, recognized that "'the government's interest of the state in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer.'" (*Indiana v. Edwards*, *supra*, 554 U.S. at p. 177, quoting *Martinez v. Court of Appeal, supra*, 528 U.S. at p. 163.) The legislative history of Penal Code section 686.1 expressly states that that statute requiring counsel, at all stages, including the penalty phase, was intended to ensure the reliability of the death judgment.

In the preceding argument, appellant has urged that *Indiana v. Edwards* permits the sate to enforce Penal Code section 686.1 at the guilt phase. Because a defendant's interest in self-representation is even less following a conviction (*Martinez v. Court of Appeal*, *supra*, 528 U.S. at p. 168), even if this court refuses to enforce Penal Code section 686.1 at the guilt phase, it should enforce that statute at the penalty phase. The trial court erred in not

doing so. The failure of the trial court to provide counsel at the penalty phase requires reversal of the death judgment.

B. The Trial Court Violated Penal Code section 686.1 By Permitting Appellant To Waive Counsel At The Penalty Phase.

1. Penal Code § 686.1 Requires Counsel At The Penalty Phase, And It Does So In Order To Ensure The Integrity Of A Death Judgment.

The language of Penal Code section 686.1 could not be clearer:

> Notwithstanding any other provision of law, the defendant in a capital case shall be represented in court by counsel at all stages of the preliminary and trial proceedings.

As discussed in Argument IV, the Legislature has required that capital defendants be represented by counsel at all stages, including the penalty phase. In the instant case, the trial court violated the letter and the spirit of 686.1 in permitting appellant to waive counsel at the penalty phase. Decisions of the high court, including *Indiana v. Edwards,* permit the states to enforce statutes which are intended to ensure the integrity of criminal judgments, where the integrity of such judgments constitutes an important state interest, and where that interest is undermined by self-representation.

2. United States Supreme Court Decisions Permit California To Restrict The Sixth Amendment Right Of Self-Representation Where The Exercise Of That Right Compromises The Integrity Of Its Death Judgments.

As discussed in IV, above, after the United States Supreme Court decided *Faretta v. California* in 1975, the courts of this state interpreted that decision as establishing a defendant's absolute right to self-representation. (See *People v. Taylor*, *supra*, 47 Cal.4th at p. 872.) However, in a series of decisions since *Faretta*, the Supreme Court has held that the right is, in fact, "not absolute," (*Indiana v. Edwards*, *supra*, 554 U.S. at p. 171), and may be limited by a number of state interests. (See *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.* (2000) 528 U.S. 152, 163 [no right of self-representation on direct appeal in a criminal case]; *McKaskle v. Wiggins*, 465 U.S. 168, 178-179 (1984) [appointment of standby counsel over self-represented defendant's objection is permissible]; *Faretta*, 422 U.S., at 835, n. 4 [no right "to abuse the dignity of the courtroom"]; *ibid.* [no right to avoid compliance with "relevant rules of procedural and substantive law"]; *id.*, at 834, n. 46 [no right to "engag[e] in serious and obstructionist misconduct," referring to *Illinois v. Allen* (1970) 397 U.S. 337]. See generally, *Indiana v. Edwards*, *supra*, 554 U.S. at p. 171.)

In *Indiana v. Edwards*, the Supreme Court held that the states may limit the right of self-representation by mentally-ill defendants. (*Id.*) The Supreme Court's rationale for this limitation is important:

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

(*Id.* at p. 176-177.)

The question presented here is whether California's "interest in ensuring the integrity and efficiency of the trial" resulting in a death judgment – an interest the Legislature attempted to advance in Penal Code section 686.1 – "at times outweighs the defendant's interest in acting as his own lawyer"?

The answer to that question must be in the affirmative. This is so for three reasons. First, California's interest in the integrity of a judgment of death is at least as strong as was Indiana's interest in the integrity of its non-capital judgments at issue in *Indiana v. Edwards*. *Edwards*, it must be remembered, was a non-capital case in which the defendant was convicted of attempted murder. While *Indiana v. Edwards* holds that the state has a strong interest in the integrity of its non-capital judgments, a state's interests in the reliability of its capital judgments is greater still. This is the teaching of cases dating as far back as *Gregg v. Georgia* (1976) 428 U.S. 153, 188. In *Gregg*, the Supreme

Court held that while of the death penalty itself does not violate the Constitution's ban on cruel and unusual punishments, "the penalty of death is different in kind from any other punishment imposed under our system of criminal justice. Because of the uniqueness of the death penalty," the court held that it "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." As the court later explained in *Gardner v. Florida* (1977) 430 U.S. 349, 357-358:

> From the point of view of the defendant, [the death penalty] is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

Our legislature has attempted to vindicate this well-recognized interest in reliable death judgments by requiring that capital defendants be represented by counsel, at least at the penalty phase. Without denigrating the state's interests articulated in *Indiana v. Edwards*, it is difficult to conceive of a state interest as compelling as California's in the reliability of its death judgments.

Second, Penal Code section 686.1 requires counsel at all phases of a capital trial, and appellant has argued that *Indiana v. Edwards* permits the state to limit the right to self-representation at the guilt phase. (See Argument IV, above.) Notwithstanding that argument, the contention appellant advances in

this portion of his brief is a more modest one: namely, that while it may be argued that *Faretta* protects the right of a capital defendant to represent himself at the trial on guilt or innocence, the balance shifts once the defendant has been convicted. At that point, the state's interests in the integrity of a death judgment permits the state to limit that right at the penalty phase.

Appellant is well aware that this court has, in several cases that ***predated*** *Indiana v. Edwards*, rejected the claim that California may limit the right to self-representation at the penalty phase. (*People v. Blair* (2005) 36 Cal.4th 686, 736-740; *People v. Koontz* (2002) 27 Cal.4th 1041, 1073-1074; *People v. Bradford* (1997) 15 Cal.4th 1229, 1364-1365; *People v. Bloom* (1989) 48 Cal.3d 1194, 1222-1223; *People v. Clark* (1990) 50 Cal.3d 583, 617 and fn. 26.)

In the wake of *Indiana v. Edwards*, however, it is now apparent that the holdings of these cases were based on an incorrect view of the *Faretta* right as absolute, or an an incorrect view of the balance between a defendant's *Faretta* right and the states' interest in obtaining reliable criminal judgments.

Thus, in *People v. Bloom*, *supra*, 48 Cal.3d 1194, this court acknowledged that the Eighth Amendment imposed a "high requirement of reliability on the determination that death is the appropriate penalty in a particular case," but stated that "the high court has never suggested that this heightened concern for reliability requires or justifies forcing an unwilling defendant to accept representation ... in a capital case." (*Id.* at p. 1228.)

Indiana v. Edwards has now made that very suggestion.

People v. Clark, supra, 50 Cal.3d 583, reached the same conclusion, and rejected the argument that *Faretta* "invalidates [Penal Code] section 686.1 which mandates representation by counsel in all stages of a capital trial, only as to the guilt phase." (*Id.* at p. 617, fn. 26.) *Clark's* holding is no longer good law, however, as it was expressly premised on the now discredited theory that the right recognized in *Faretta* "is absolute." (*Id.*) *Clark's* holding is has been fully undermined by *Indiana v. Edwards* , which expressly held that "the right of self-representation is not absolute," (*Indiana v. Edwards*, *supra*, 554 U.S. at p. 171), and by the further holding in that case the states may restrict that right in order to vindicate strong state interests in reliability.

Similarly, in *People v. Bradford*, *supra*, 15 Cal.4th 1229, and *People v. Koontz, supra*, 27 Cal.4th 1041, the court again acknowledged "the state's significant interest in a reliable penalty determination," but held that "a defendant's fundamental constitutional right to control his defense governs." (*Bradford,* 15 Cal.4th at pp. 1364-1365; *Koontz*, 27 Cal.4th at p. 1074.) *Indiana v. Edwards* holds, however, that the defendant's right to control his defense in fact does not always govern, and that the state courts may take into account, and balance that right, against the state's strong interest in reliable judgments. While *Indiana v. Edwards* was not a capital case, its holding that a state may restrict self-representation in a non–capital case in order to obtain a reliable judgment compels the conclusion that it may do so in a capital case, where concerns for reliability (as this court has repeatedly pointed out) are

heightened.

People v. Blair, *supra*, 36 Cal.4th 686, similarly premised its rejection of the claim – that a defendant may not waive counsel at the penalty phase – on the preeminence of "the defendant's autonomy interests" which are as strong at the penalty phase as they are in the guilt phase. (*Id.* at p. 738.) Again, *Indiana v. Edwards* accepts the notion of the defendant's autonomy interest, but insists that it must be balanced against the state's interests in reliability, and that where the state's interest is strong (as it is in a capital case), the defendant's autonomy interest may be restricted.

The only case considering the effect of *Indiana v. Edwards* on the *Faretta* calculus, is *People v. Taylor*, *supra*, 47 Cal.4th 850. Again, however, this court in *Taylor* simply relied on its prior cases for the proposition that "the autonomy interest motivating the decision in *Faretta* – the principle that for the state to 'force a lawyer on a defendant' would impinge on 'that respect for the individual which is the lifeblood of the law,' – applies at a capital penalty trial as well as in a trial at guilt." (*Id.* at p. 865 [citations omitted.) *Indiana v. Edwards* held, however, that a defendant's autonomy interests did not justify self-representation in that case. The Supreme Court pointed out that that the "right of self-representation at trial will not 'affirm the dignity' of a defendant who lacks the mental capacity to conduct his defense at trial without the assistance of counsel." (*Indiana v. Edwards*, *supra*, 554 U.S. at p. 176.) The Court concluded that permitting a defendant to affirm his dignity by conducting his own defense would exact an intolerable toll on the competing, overriding

interest of providing a fair trial. (*Id.* at p. 177.)

Taylor simply did not recognize this core teaching of *Indiana v. Edwards,* namely, that the state's interest in reliability may require restriction of the defendant's autonomy interests.

Indiana v. Edwards thus permits this court to enforce its our state's statutory law, embodied in Penal Code section 686.1, that advances a strong interest in the reliability of its criminal judgments.

Seven years ago, Justice Chin, joined by Justices Baxter and Brown, bemoaned the fact that California was prevented by *Faretta* from enforcing the mandate of Penal Code section 686.1. (*People v. Dent*, *supra*, 30 Cal.4th 213 *at* pp. 223-224.) As Justice Chin stated,

> There is much to be said for modifying *Faretta*, at least in capital cases, to give the trial court discretion to deny a request for self-representation when no good ground exists for the request and the defendant is not capable of effective self-representation. But such modification is not for us to do. As Justice Richardson stated, we must "await further instruction on the point from the high court which originated the *Faretta* principle.

(*Id.* at p. 224.)

Indiana v. Edwards has now provided that "further instruction." Its teaching should not be lost of this court, which is now in a position, nearly 40 years after its enactment, to enforce the legislative mandate of Penal Code

section 686.1 at the penalty phase.

3. The Trial Court Violated Penal Code § 686.1 By Failing To Require Counsel At The Penalty Phase.

The foregoing decisions of the Supreme Court thus hold that the states are free, in certain circumstances, to enforce their laws requiring counsel in criminal prosecutions. Because those decisions gave California the latitude to enforce Penal Code section 686.1, requiring counsel at the penalty phase, the trial court was required to follow the clear mandate of that statute. The failure to do so was error. (See *People v.* Carter (1967) 66 Cal.2d 666, 672 [error to permit defendant to waive counsel in violation of state law]; *People v. Robles* (1970) 2 Cal.3d 205, 218-219 [same].)

C. Denial Of Counsel At The Penalty Phase Requires Reversal Of The Judgment Of Death.

The erroneous deprivation of the right to counsel under state law requires reversal without a showing of prejudice. (*People v. Carter* (1967) 66 Cal.2d 666, 672 [reversing judgment without showing of prejudice where defendant erroneously permitted to represent himself]; People *v. Robles* (1970) 2 Cal.3d 205, 218-219 [reversing judgment of death without showing of prejudice where defendant erroneously permitted to represent himself at penalty phase].)

The judgment of death in appellant's case must therefore be reversed.

VI. BECAUSE MR. MICKEL WAIVED HIS RIGHT TO COUNSEL, AND ELECTED TO REPRESENT HIMSELF BEFORE THE STATE HAD EVEN FILED ITS NOTICE OF INTENT TO SEEK DEATH, THE TRIAL COURT ERRED IN FAILING TO OBTAIN AN UPDATED WAIVER.

A. Introduction

Mr. Mickel first stated his intention to waive counsel at the arraignment on January 30, 2003. At the time, he was charged with special circumstances murder. The state, however, did not file a Penal Code section 190.3 notice of an intent to seek death. The trial court did not grant Mr. Mickel's motion for self-representation until December 8, 2003. Ten hearings were conducted in the months between the January 30 arraignment and the December 8 granting of the motion to waive counsel. At none of those hearings in that ten month period did the prosecution declare an intention to seek death. The prosecution did so, however, on February 9, 2004, at the hearing following the granting of Mr. Mickel's waiver of counsel.

Despite this radical change in the nature of the prosecution to one seeking death, the trial court erroneously failed to obtain an updated waiver of counsel from appellant, and failed to question appellant about whether he understood the penal consequences he was facing.

As more fully discussed below, before a defendant may represent

himself he must first validly waive his right to counsel. At no time in this case did the trial court conduct the necessary and proper inquiry to ensure that appellant waived his right to counsel with an understanding of the ultimate penal consequence he actually ended up facing. As a result, the judgment rendered in both the guilt and penalty phases must be reversed.

B. Relevant Facts

Following his extradition from New Hampshire, appellant was arraigned in Tehama County Superior Court on January 30, 2003. (1 RT 5-7.) The felony complaint charged murder (Pen. Code § 187(a)), with the special circumstance of murder of a police officer engaged in his duties. (Pen. Code § 190.2(a)(7).) (1 RT 5.) Appellant told the court that he wanted to represent himself, and have the public defender appointed as co-counsel. (1 RT 6.) The court appointed the public defender and continued the matter. (*Id.*)

On February 4, 2003, appellant appeared with counsel, James Reichle, for further arraignment. Appellant reiterated his request to represent himself. (1 RT 11.) A brief colloquy between the court and appellant showed that appellant had no idea what a preliminary hearing was:

THE COURT: Sir, do you have any idea what a preliminary hearing is?

DEFENDANT: I know that the preliminary hearing is the – is

> basically just – basically right before the actual trial, it is where the evidence is set forth sort of as a rehearsal, so to speak.

(1 RT 11.)

With some understatement, the court replied that appellant's understanding "was not very good" and did not "demonstrate a very sophisticated or, for that matter, any grasp of the law." (1 RT 11.) The court then explained the purpose of a preliminary hearing, and stated that if the People carry their burden at that hearing, they will file an information. A brief colloquy then revealed appellant did not know what an information was either:

> THE COURT: Do you know what an information is, sir?
>
> DEFENDANT: Is it similar to discovery?
>
> THE COURT: I will take that as "no," you don't know.

(1 RT 13.)

The court advised appellant it would be to his advantage to have counsel at the preliminary examination and that it was "foolish for a person to represent themselves when they have no knowledge of the law." (1 RT 14.) Appellant then agreed to allow counsel to represent him at the preliminary hearing. (*Ibid.*) Ultimately, appellant was held to answer on both the murder charge and the special circumstance. (1 RT 221-222.)

The information, charging murder and the special circumstance, was filed on May 29, 2003. (3 CT 685-686.) As to potential sentences, the information contained the following notation: "SENTENCING RANGE: LWOP/DEATH". (3 CT 686.) Still represented by Mr. Reichle, appellant pled not guilty on June 9, 2003. (2 RT 227-230.) The prosecution had still not affirmatively stated, however, that it would seek death.

More than five months later, on November 20, 2003, Mr. Reichle filed a "Notice of Motion and Points And Authorities: Defendant's Self-Representation As A Matter Of Right." (3 CT 738-747.) On November 24, 2003, Mr. Mickel filed his own brief in support of his motion for self-representation. (3 CT 751-766.)

Mr. Mickel's motion for self-representation was heard on December 8, 2003. (2 RT 244-259.) The court began by asking if appellant had completed the waiver form. (2 RT 245-246.) He had. A copy of the waiver form appears at 3 CT 788. That form consists of one page, in which Mr. Mickel acknowledged that he had been "personally advised of the following:

> "1. That it is generally not a wise choice to represent myself in a criminal matter.
>
> 2. The penalties for the offense[s] if found guilty and additional consequences that could result.

3. That the court will not give me any special consideration because I am representing myself.

4. That I will be opposed by a trained prosecutor.

5. That I must comply with all the rules of criminal procedure and evidence.

6. That incompetency of counsel as an issue on appeal is waived.

7. That any disruptive behavior on my part may result in the Court terminating my pro per status.

8. That if I cannot afford an attorney, I have a right to have one appointed at no cost to me."

(3 CT 788.)

The trial court examined Mr. Mickel with respect to several of the specific acknowledgments stated in the waiver form.[11] As to acknowledgments (1) and (4), the court informed appellant that "generally speaking, it is unwise for someone to represent themselves for a variety of reasons" and explained that the prosecution would be represented by an experienced attorney. (2 RT 246-247.) As to acknowledgments (3), (6) and (7), the court advised Mr. Mickel that it could not assist him if he represented himself, the court could terminate his self-representation if there were any "difficulties in your behavior"; and that appellant will waive claims of ineffective assistance of

---

[11] The trial court's colloquy with appellant regarding the *Faretta* waiver form is set out in the Appendix to this brief.

counsel. (2 RT 248-249.) Mr. Mickel stated that he understood. (*Id.*)

Critically, the court did not examine Mr. Mickel at all in connection with acknowledgment (2) on the form. As noted, in paragraph (2) Mr. Mickel gave a conclusory acknowledgment that he had been told of the penalties for the offense. Yet nowhere in the oral proceedings are the penalties described.

The court then "recognize[d] the Defendant's right under *Faretta* to represent himself." (2 RT 254) The court found that "the Defendant's waiver to right of counsel is knowing, intelligent, express and explicit, and that therefore he is entitled to make that decision. The court will at this time permit the Defendant to represent himself." (2 RT 254.)

At the conclusion of the hearing, Mr. Mickel, then representing himself, entered a plea of not guilty and denied the special circumstance. (2 RT 258.)

At the next hearing, on February 9, 2004, after Mr. Mickel had finally succeeded in waiving the right to counsel – the prosecution announced for the first time that "this will be a death penalty case." (2 RT 261.) The prosecutor stated that he had "let Mr. Reichle know that before. But I am just stating for the record that it will be my intention to seek death in this matter." (*Id.*)

Mr. Mickel had stated his intention to waive counsel at his first appearance on January 30, 2003. There were ten hearings in the ten months between that hearing and the hearing on December 8, 2003 when the court granted Mr. Mickel's motion for self-representation. During that 10 month period, the prosecution did not state on the record that it intended to seek death.[12] As noted, Mr. Mickel was granted self-representation on December 8, 2003. In the very next court proceeding – after Mr. Mickel had elected to represent himself -- the prosecution informed the court and the defendant that this would in fact be a death case. Of course, at this point, Mr. Mickel had already waived his right to counsel. And although the case was now a death case, the trial court did not question Mr. Mickel further on whether he wished to continue to represent himself.

A year later, on January 19, 2005, the court conducted a pretrial status

---

[12] Prior to the hearing on February 9, 2004, the only references in the record to the case being a death penalty case were two statements made *by defense counsel*, James Reichle. First, on April 22, 2003, Mr. Reichle stated, in the course of discussing a motion to seal documents, that "[a]s we all know, this being a capital case, everything is recorded...." (1 RT 67.) And, on June 9, 2003, in connection with preparation of transcripts, Mr. Reichle stated that, "under 190.9 of the Penal Code, if the Prosecution gives notice that this – they intend to seek the death penalty, it triggers the preparation of transcripts from the beginning prior to the preliminary hearing." (2 RT 228.) The prosecution, of course, did not give notice under Penal Code section 190.9 until February 9, 2004. And, at neither of these points at which Reichle made the above statements, was the nature and complexity of a death penalty case, and the value of counsel in such a case, explained to appellant.

conference. (3 RT 503-530.) At that hearing, Mr. Reichle told the court that jury selection may go slower than usual because of Mr. Mickel's unfamiliarity with the procedure. (3 RT 515.) The court then asked, "Should I be readdressing the *Faretta* question?" (3 RT 515-516.) Mr. Mickel said, "No, Your Honor." (*Id.*) The court then stated that it had reviewed the file and "I think I'm comfortable with where we are," but noted that "jury selection is a challenge," and that "I can't help you do it. You are on your own with the assistance of advisory counsel." (3 RT 516.) Mr. Mickel responded that "I have fully understood the depths in which I have thrust myself. And I understand it is wholly my responsibility, and it is a large task, and that I have got my work cut out for me. I understand all of that. And we really don't need to readdress the *Faretta* issue because I'm fully aware of all the difficulties that will be involved." (3 RT 516-517.) As shown more fully below, the foregoing did not amount to an adequate *Faretta* advisement by the trial court.

C. The Legal Standard For Waiver of Counsel

Under the Sixth Amendment, a defendant in a criminal case has a right to counsel at all critical stages in the proceedings. (*Mempa v. Rhay* (1967) 389 U.S. 128, 134.) That constitutional right to counsel may be waived by a defendant who wishes to represent himself. (*Faretta v. California, supra,* 422 U.S. 806, 807.) However, any defendant's waiver of his right to counsel must be done "knowingly and intelligently." (*Id.* at 835, quoting *Johnson v. Zerbst*

(1938) 304 U.S. 458, 464-465.)

"It is the State's burden to show that a waiver [of the right to counsel] is knowing and voluntary. (*Michigan v. Harvey* (1990) 494 U.S. 344, 354. Accord, *People v. Hall* (1990) 218 Cal.App.3d 1102, 1105; *People v. Fabricant* (1979) 91 Cal.App.3d 706, 712.) As the Supreme Court explained in *Brewer v. Williams* (1977) 430 U.S. 387, when the waiver of the right to counsel is at issue, it is "incumbent upon the State to prove 'an intentional relinquishment or abandonment of a known right or privilege.'" (*Id.* at p. 404, quoting *Johnson v. Zerbst*, 304 U.S., at 464, 58 S.Ct., at 1023.) "[The] courts indulge in every reasonable presumption against waiver, e. g., *Brookhart v. Janis*, supra, 384 U.S. at 4; *Glasser v. United States*, 315 U.S. 60, 70. This strict standard applies equally to an alleged waiver of the right to counsel whether at trial or at a critical stage of pretrial proceedings. *Schneckloth v. Bustamonte*, 412 U.S. 218, 238-240; *United States v. Wade*, 388 U.S., at 237." (*Id.* at p. 404.)

The content required for a valid waiver is well-established: "'No particular form of words is required in admonishing a defendant who seeks to waive counsel and elect self-representation.' (*People v. Koontz* (2002) 27 Cal.4th 1041, 1070.) Rather, 'the test is whether the record as a whole demonstrates that the defendant understood the disadvantages of

self-representation, including the risks and complexities of the particular case.' (*Ibid.*; accord, *People v. Lawley* (2002) 27 Cal.4th 102, 140; *People v. Marshall* (1997) 15 Cal.4th 1, 24.)" (*People v. Blair* (2005) 36 Cal.4th 686, 708.)." (*People v. Burgener*, 46 Cal.4th 231, 240-241.) "The 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. 389,401, fn. 12, emphasis in original.) Put otherwise, the record must establish that the defendant "knows what he is doing and his choice is made with eyes open." (*Faretta, supra*, 317 U.S. at p. 242.)

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 earlier stages of criminal proceedings. (*Patterson v. Illinois* (1988) 487 U.S. 285, 298-300 ["[R]ecognizing the enormous importance and role that an attorney plays at a criminal trial, we have 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."].) Thus, the high court has demanded that "[w]arnings of the pitfalls

of proceeding to trial without counsel ... must be rigorously conveyed.". (*Iowa v. Tovar* (2004) 541 U.S. 77, 89.

"A defendant may challenge the grant of a motion for self-representation on the basis that the record fails to show that the defendant was made aware of the risks of self-representation." (*People v. Bloom* (1989) 48 Cal. 3rd 1194, 1224.) In the context of waiving counsel prior to a guilty plea, the Supreme Court has held held that a full understanding of "the risks and complexities of the particular case," or the "significance and consequences of a particular decision" to waive counsel requires that the trial court inform the defendant "of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon entry of a guilty plea." (*Iowa v. Tovar* (2004) 541 U.S. 77, 80; *Von Moltke v. Gillies* (1948) 332 U.S. 708, 724 (plurality opinion) [reversing denial of habeas petition because standard, pre-printed waiver of counsel form was insufficient to satisfy Sixth Amendment, and holding that "[t]o be valid such waiver [of the right to counsel] must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder ...."]; *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 244, fn. 32.

Virtually every federal circuit has adhered to this rule that a defendant seeking self-representation be advised of the charges and the range of

allowable punishments. (*Torres v. United States* (2d Cir. 1998) 140 F.3d 392, 404; *United States v. Peppers* (3d Cir. 2002) 302 F.3d 120, 135; *United States v. Brown* (5th Cir. 1978) 569 F.2d 236, 242; *United States v. Carradine* (6th Cir. 2010) 621 F.3d 575, 578-579; *Bennett v. U.S.* (7th Cir. 1969) 413 F.2d 237, 243; *United States v. Balough* (9th Cir.1987) 820 F.2d 1485, 1487; *Maynard v. Boone* (10th Cir. 2006) 468 F.3d 665, 677; *United States v. Garey* (11th Cir. 2008) 540 F.3d 1253, 1266.)

The state courts are in accord. (E.g., *State v. Collins* (Conn. 2011) 299 Conn. 567, 614, 10 A.3d 1005, 1033 ["It is well settled that, in canvassing a defendant seeking to exercise his right of self-representation, a trial court must apprise him of the possible range of criminal penalties or punishments to which he is exposed."]; *State v. DuBois* (N.J. 2007) 189 N.J. 454, 467, 916 A.2d 450; *Hooks v. State* (Nev. 2008) 124 Nev. 48, 176 P.3d 1081; *State v. Glasure* (Ohio App. 1999) 132 Ohio App.3d 227, 235. 724 N.E.2d 1165; *State v. Dvorak* (N.D. 2000) 604 N.W.2d 445, 450 fn. 1; *State v. Davis* (Mo. App. 1996) 934 S.W.2d 331, 334-335; *Parren v. State* (Md. 1987) 309 Md. 260, 278-279, 523 A.2d 597. See also *Hsu v. U. S.*(D.C. 1978) 392 A.2d 972, 984.)

It is hardly surprising that the courts have held that in advising a defendant of the risks of self-representation, a court must advise the defendant of the charges and penal consequences of his decision. The risks of self-representation, after all, do not merely include the risk that the defendant will more readily be found guilty. Rather, because "the defendant, and not his

lawyer or the State, will bear the personal consequences of a conviction," (*Faretta, supra*, 422 U.S. at p. 834), it is those personal consequences of which the defendant must be made aware. The most immediate personal consequence, of course, is the punishment the defendant will suffer from a conviction.

Moreover, the requirement to advise a defendant of the consequences in the *Faretta* context is simply a specific application of the more general rule that when a criminal defendant gives up other fundamental constitutional trial rights, such as the right to jury trial and confrontation, a knowing and intelligent waiver requires that the defendant advised of the direct, penal consequences of the plea. (*Boykin v. Alabama* (1969) 395 U.S. 238; *Brady v. United States* (1970) 397 U.S. 742, 755; *In re Tahl* (1969) 1 Cal.3d 122, 132 [defendant must be advised of charges and penal consequences prior to guilty plea].)[13]

---

[13] California law similarly provides that a defendant's waiver of a fundamental constitutional right may not be accepted by the court "unless it is knowing and intelligent, that is, "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* (2001) 26 Cal.4th 297, 305.) [citations omitted].) Where a defendant's waiver of a constitutional right hinges on "[m]istake, ignorance or any other factor overcoming the exercise of free judgment," the waiver is involuntary. (*People v. Cruz* (1974) 12 Cal.3d 562, 566-567.) Thus, where a defendant waives his right to a jury trial, and pleads guilty, based on a misunderstanding as to the penal consequences of the acts he committed, the waiver is invalid. (See , e.g. , *People v. Crumpton* (1973) 9 Cal.3d 463, 468; *People v. McCary* (1985) 166 Cal.App.3d 1, 10; *People v. Caban* (1983) 148 Cal.App.3d 706, 711-712.)

D. Appellant's Waiver Of Counsel Was Not Knowing And Intelligent Because The Record Fails To Disclose That, At The Time He Waived The Right To Counsel, Appellant Was Made Aware That The People Were Seeking The Death Penalty.

The record in this case establishes only the following: that when petitioner asserted his right to represent himself, the court reviewed with appellant his *Faretta* waiver form. While appellant stated in the waiver form that he had been advised of "the penalties for the offense[s] if found guilty and additional consequences that could result," (3 CT 788), the record does not indicate that the trial court or defense counsel told appellant that he was facing a death sentence. The record thus fails to establish that appellant was informed that the prosecution was seeking the death penalty, as opposed to a sentence of life without parole.

This is no mere legal quibble. The legislature has specifically required, and this court has held, that if the state intends to seek the death penalty, it must so advise the defendant of that fact prior to the guilt phase. (Pen. Code § 190.3.)[14] This court "[has] interpreted section 190.3 as requiring that notice be given ***before the guilt phase*** of the trial. (*Keenan v. Superior Court* (1981) 126

---

[14] Section 190.3 provides in pertinent part: "Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial."

Cal.App.3d 576; *People v. Miranda* (1987) 44 Cal.3d 57, 96-97.) The purpose of the notice provision is to advise an accused of the evidence against him so that he may have a reasonable opportunity to prepare a defense at the penalty trial. (*People v. Miranda, supra*, 44 Cal.3d at p. 96.)" (*People v. Taylor* (1990) 52 Cal.3d 719, 736 [emphasis added].) If the prosecution fails to comply with the section 190.3 notification, "no evidence may be presented by the prosecution in aggravation," (Pen. Code § 190.3), and the prosecution would therefore be barred from seeking the death penalty.

The record in the instant case does not disclose that, prior to his waiver of the right to counsel, appellant was ever advised that he was facing the death penalty. To be sure, at the *Faretta* hearing the trial court confirmed that appellant had been "advised of the "penalties for the offense." But the penalties of which appellant was advised were not identified. It was not until the hearing on February 9, 2004, some two months ***after*** appellant waived his right to counsel, that the prosecution gave notice, as required by Penal Code section 190.3, that appellant would indeed be facing the death penalty.

When the prosecutor stated his intent to seek death, the court did not discuss with appellant whether that dramatic change in the penal consequences affected appellant's decision to represent himself. This was error.

Generally, a *Faretta* waiver remains in effect throughout the criminal proceedings, unless the circumstances suggest the waiver was limited. (*Arnold v. United States* (9th Cir.1969) 414 F.2d 1056, 1059; *White v. United States* (9th Cir.1965) 354 F.2d 22, 23.) However, a "substantial change in circumstances will require the district court to inquire whether the defendant wishes to revoke his earlier waiver." (*United States v. Fazzini* (7th Cir.1989) 871 F.2d 635, 643; *Schell v. United States* (7th Cir.1970) 423 F.2d 101, 102-03 [waiver of counsel invalidated by increased maximum sentence, among other things]; *United States v. McBride* (6th Cir.2004) 362 F.3d 360, 367 [adopting the rule that defendant's waiver of counsel at trial carried over to subsequent proceedings absent a substantial change in circumstances]; *United States v. Unger* (1st Cir.1990) 915 F.2d 759, 762; *United States v. Fazzini*, 871 F.2d 635, 643 (7th Cir.1989) ("Once the defendant has knowingly and intelligently waived his right to counsel, only a substantial change in circumstances will require the district court to inquire whether the defendant wishes to revoke his earlier waiver."]. Compare *Torres v. United States* (2d Cir.1998) 140 F.3d 392, 404 [fact that judge decided to submit sentencing to jury after *Faretta* waiver did not vitiate waiver because it did not increase the penalty defendant faced].)

A requirement of readvisement under changed circumstances is fully consistent with the Supreme Court's repeated holding that a waiver of counsel is valid only if made with an awareness of the possible penalties and with eyes

open. (*Faretta*, *supra*, 422 U.S. at 835. *Von Moltke*, *supra*, 332 U.S. at 723.) It is also consistent with, and required by, Supreme Court precedent governing the waiver of counsel in other contexts. Thus, in *Patterson v. Illinois* (1988) 487 U.S. 285, the court addressed the question whether a defendant's pre-indictment waiver of counsel for purposes of interrogation, carried over to post-indictment questioning by the authorities. In answering this question, the court stated that "we have defined the scope of the right to counsel by a pragmatic assessment of the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel. An accused's waiver of his right to counsel is "knowing" when he is made aware of these basic facts." (*Id.* at p. 298.)

The *Patterson* court held that no additional advisements were required in that case because:

> "whatever warnings suffice for *Miranda* 's purposes will also be sufficient in the context of postindictment questioning. The State's decision to take an additional step and commence formal adversarial proceedings against the accused does not substantially increase the value of counsel to the accused at questioning, or expand the limited purpose that an attorney serves when the accused is questioned by authorities. With respect to this inquiry, we do not discern a substantial difference between the usefulness of a lawyer to a suspect during custodial interrogation, and his value to an accused at postindictment questioning."

(*Id.* at pp. 298-299.) The court noted that, for this reason, we require a more

searching or formal inquiry before permitting an accused to waive his right to counsel at trial than we require for a Sixth Amendment waiver during postindictment questioning- not because postindictment questioning is "less important" than a trial ... but because the full "dangers and disadvantages of self-representation," *Faretta*, *supra*, 422 U.S. at 835, during questioning are less substantial and more obvious to an accused than they are at trial." (*Id.* p. 299.)

The question here is whether "the State's decision to take the additional step" of seeking the death penalty (*Patterson*, *supra*, 487 U.S. at p. 298), triggered a series of procedures which substantially increase[d] the "usefulness of counsel," particularly in ways the accused might not have appreciated.

The answer to that question must be obvious. Once the state has declared its intention to seek death, that decision triggers an entire array of procedures not present in a noncapital trial. Most importantly, the jury must be death-qualified, (*Witherspoon v. Illinois* (1968) 391 U.S. 510), and the defendant must prepare for and face not one, but two inherently antagonistic trials: one on guilt and one on penalty.

The American Bar Association has clearly spelled out the enormous differences between the role of counsel at capital and noncapital cases. (See

"ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases" (rev. ed.2003), reprinted in 31 Hofstra L.Rev. 913, 1027 (2003).) The ABA Guidelines, spanning 130 pages, identify the specific obligations of capital counsel, from investigating the case and the client's background, to conducting voir dire, to presenting a penalty phase. As one commentator has explained, "First, capital trials are much harder to litigate well than noncapital trials. Built into them are a hugely complicated body of specialized law, a second, sentencing trial that almost always is more far-ranging, expert-dependent, and factually complex than the guilt phase, and a a host of peculiar tactical and strategic decisions caused by the need to 'unify' one's defense strategy at two individually daunting and jointly contradictory proceedings." (J. Leibman, "The Overproduction of Death," 100 Columbia L.R. 2030, 2102-2103 (2000).

For the foregoing reasons, when the prosecution in Mr. Mickel's case declared that it intended to take Mr. Mickel's life, it triggered a series of procedures at which the potential value of counsel was substantially increased. Moreover, the value of counsel at these additional capital procedures could hardly have been "obvious" to a layperson. (*Patterson*, *supra*, 487 U.S. at p. 298.) The record in the instant case graphically illustrates this fact. Mr. Mickel thought that a preliminary examination was a "rehearsal" and that an information was equivalent to discovery. The trial court remarked that Mr.

Mickel did not "demonstrate a very sophisticated or, for that matter, any grasp of the law." (1 RT 11.) To say that, for an unsophisticated defendant, the intricacies of death qualification and penalty phase procedure are not obvious is something of an understatement.

Because of the significant value of counsel in a death case, a value which would not necessarily be obvious to a lay defendant with no grasp of the law, United States Supreme Court precedent compelled the trial court, after the State filed its section 190.3 notice of intent to seek death, to re-confirm Mr. Mickel's previous *Faretta* waiver. The trial court here failed to obtain any further waiver from Mr. Mickel, or confirm, in the face of the drastically changed circumstances, that he desired to continue to waive his right to counsel. As a result, Mr. Mickel's original waiver of the right to counsel for a non-capital trial was neither a knowing nor an intelligent waiver for a capital trial.

The error was not cured by the trial court's belated remark, just prior to jury selection on January 19, 2005, whether it should "readdress[] the *Faretta* question." This is so for two reasons.

First, the critical fact in evaluating whether a defendant waived his right to counsel "with his eyes open," depends only on what the defendant understood at the time of his waiver. A defendant's statement regarding the nature of his

understanding at a later stage of the trial does not shed light on what he understood when he waived the right to counsel. This is the thrust of *United States v. Erskine* (9th Cir. 2004) 355 U.S. 1161. There, the defendant claimed that his pretrial *Faretta* waiver was not knowing and intelligent because, during the colloquy on his waiver, he was misadvised as to the penal consequences. The government asserted that the defendant's comments at the time of sentencing indicated that he understood the penal consequences at the time he waived the right to counsel.

The court of appeal rejected the argument, reasoning that the issue was not what the defendant understood at the sentencing, but what he understood at the time he waived the right to counsel. The question, said the court, "is not, broadly, what the record reveals about Erskine's understanding of the possible penalty throughout the different stages of the proceedings-pre-trial, trial, and sentencing-but specifically what the defendant understood at the particular stage of the proceedings at which he purportedly waived his right to counsel." (*Id.* at p. 1169.)

This is not to say that all events subsequent to the waiver are irrelevant. As *Erskine* explained, such statements may be relevant if they "bear on the specific question of what Erskine understood at the time he purportedly waived his right to counsel. For example, had Erskine admitted, at the time of

sentencing, that he had known the maximum penalty all along, this evidence would be relevant to our determination because it would shed light on the state of his understanding at the time of the prior Faretta hearing." (*Id.*) But absent such statements referencing a defendant's state of mind at the time of the waiver, the court must rely the waiver colloquy itself to determine whether the defendant acted knowingly and intelligently. (*Id.* at pp. 1170-1171.) It is thus "only a specific inquiry into the status of the defendant's knowledge and understanding at the time of the purported waiver will allow us to determine whether Erskine opted to forgo counsel "with eyes open," (see *Faretta*, 422 U.S. at 835, 95 S.Ct. 2525), and thus, to decide whether his waiver was in fact knowing and intelligent when it was made. (*Id.* at pp. 1170-1171.)

(Accord, *United States v. Balough* (9th Cir. 1987) 820 F.2d 1485, 1489 [stating that the operative inquiry is whether the evidence "show[ed] that Balough understood the dangers and disadvantages of self-representation *at the time he sought to waive his right to counsel*"]; *United States v. Dujanovic* (9th Cir. 1973) 486 F.2d 182, 186 [noting that the "keystone determination" in the waiver inquiry is the "state of mind of the accused or information at hand upon which he *at that time* intelligently waived his constitutional right of counsel."].)

For this reason, Mr. Mickel's statement, made over a year after he

waived the right to counsel, that he understood the enormity of the task before him, shed no light on what he actually understood a year earlier when he attempted to waive his right to counsel – particularly because the People had not announced an intention to seek death at the time of that waiver.

The second reason Mr. Mickel's statement at the hearing on January 30, 2004 did not make his December 8, 2003 waiver knowing and intelligent, is that the court's question, "Do I need to readdress the *Faretta* question," and the defendant's response, which is essentially "No, I know what I'm getting into," is woefully inadequate to constitute an informed and intelligent waiver of the right to counsel. The Supreme Court has explained that, "recognizing the enormous importance and role that an attorney plays at a criminal trial, we have 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. See *Faretta v. California*, 422 U.S. 806, 835-836 (1975)" (*Patterson v. Illinois*, *supra*, 487 U.S. 285, 298.) This requires that the accused be advised of the "usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel. An accused's waiver of his right to counsel is 'knowing' when he is made aware of these basic fact." (*Ibid.*)

Applying this test to the January 30, 2003 colloquy, it is patently obvious

that Mr. Mickel's unadorned statement that he understands "the depths into which he has thrust himself," is no substitute for the "rigorous restrictions" the law places on an accused's waiver of counsel. Inferring a knowing waiver from such a statement is no more valid than inferring it from a silent record. That, of course, is prohibited. (See *Carnley v. Cochran* (1962) 369 U.S. 506, 516.)

In sum, appellant's purported waiver of the right to counsel on December 8, 2002, was neither knowing nor intelligent.

E. Prejudice

The Supreme Court has held that "'the assistance of counsel is among those "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.' *Chapman v. California*, supra, at 23. Accordingly, when a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage in, at least, the prosecution of a capital offense, reversal is automatic. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Hamilton v. Alabama*, 368 U.S. 52 (1961); *White v. Maryland*, 373 U.S. 59 (1963)." (*Holloway v. Arkansas* (1978) 435 U.S. 475, 489.)

Because appellant was deprived at trial of his Sixth Amendment right to counsel, his conviction must be reversed. Accordingly, the judgment must be reversed in its entirety.

ISSUES RELATED TO THE GUILT PHASE TRIAL

VII. THE CONVICTION MUST BE REVERSED BECAUSE THE TRIAL COURT VIOLATED APPELLANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO AN IMPARTIAL JURY BY FAILING TO ADEQUATELY VOIR DIRE AND REMOVE JURORS WHO STATED ON THEIR QUESTIONNAIRES THAT THEY WOULD AUTOMATICALLY VOTE FOR DEATH IF A DEFENDANT WERE CONVICTED OF THE MURDER OF A POLICE OFFICER.

A. Summary of Argument

Appellant was charged with the capital offense of murdering a police officer who was engaged in the performance of his duties. Prior to selecting the jurors who would decide the case, the trial court had potential jurors fill out a questionnaire. One question asked jurors if they believed that the State should automatically put to death any defendant convicted of killing a police officer who was engaged in the performance of his duties – the precise question the jury would have to decide in appellant's case. Three jurors who were eventually seated, and one alternate, answered that they believed such a defendant who committed such a crime should automatically be put to death. The trial court's perfunctory voir dire did not elicit contrary answers. Despite giving this answer that indicated they could not follow the law, these jurors were permitted to sit on the jury.

The resulting jury that decided appellant's case was not impartial, and violated the Sixth Amendment right to an impartial jury. Appellant's conviction

must therefore be reversed.

B. Relevant Facts

1. The Jury Questionnaire

Prior to voir dire, the trial court had potential jurors fill out a questionnaire. The questionnaire used by the jurors appears at 8 CT 1954-1978. Each prospective juror signed the questionnaire under penalty of perjury. The questionnaire contained several questions intended to elicit the prospective jurors' views on the death penalty. Pertinent to this case, the questionnaire asked the following questions:

> 38. If the jury found a defendant guilty of intentional first degree murder and found a special circumstance to be true, would you always *vote for death*, no matter what other evidence might be presented at the penalty hearing in this case?
>
> 39. Do you feel that the State of California should *automatically put to death* everyone who:
>
> A. Kills another human being? ☐ Yes ☐ No
>
> B. Is convicted of murder? ☐ Yes ☐ No
>
> C. Is convicted of multiple murder? ☐ Yes ☐ No
>
> D. Is convicted of murder plus the murder was of a peace officer while the peace officer was engaged in the performance of his duties? ☐ Yes ☐ No

49. The murder alleged in this case alleges the special circumstances that David Mobilio was a police officer who was intentionally killed while engaged in the performance of his duties and that the defendant knew and reasonably should have known that David Mobilio was a peace officer who was engaged in the performance of his duties. Do you think that, depending on the circumstances of this case and the evidence to be presented in the penalty phase, if any:

--you could impose the death penalty in such a case? ☐ Yes ☐ No

--you could impose life in prison without parole in such a case?" ☐ Yes ☐ No

54. There are no circumstances under which a jury is instructed by the court to return a verdict of death. No matter what the evidence shows, the jury is always given the option in the penalty phase of choosing life without the possibility of parole.

(a) Given the fact that you will have two options available to you, can you see yourself, in the appropriate case, *rejecting the death penalty* and choosing life imprisonment without the possibility of parole instead? ☐ Yes ☐ No

(b) Given the fact that you will have two options available to you, can you see yourself, in the appropriate case, *rejecting life imprisonment without the possibility of parole* and choosing the death penalty instead? ☐ Yes ☐ No

55. Regarding the statement, "Anyone who intentionally kills another person should always get the death penalty, Do you

☐ Strongly agree ☐ Agree somewhat

☐ Strongly disagree ☐ Disagree somewhat

(8 RT 1966-1968 [italics in original].)

2. Seated Jurors' Questionnaires

(a) Juror 7877

Juror 7877 answered question 38 in the negative, indicating he would not always vote for death if a defendant were found guilty of first degree murder and a special circumstance. (37 CT 10721.) However, in answering question 39-D, Juror 7877 responded in the affirmative – that is, where the special circumstance involved the murder of a police officer engaged in his duties – he believed that the State of California should automatically execute any person who is convicted of such murder and special circumstance. (37 CT 10721.) This juror went further and stated in response to question 39-B that the death penalty should be automatic for any defendant convicted of murder. (*Id.*)

In response to question 49, Juror 7877 stated that, depending on the circumstances of the case and the penalty phase evidence, the juror could impose either death or life in prison without parole in a case in which it is alleged that the defendant killed a police officer in the performance of his duties. (37 CT 10723.)

Juror 7877 answered question 54(a) by stating that, "in the appropriate case," he could reject death and choose life without parole. Based on his answer to question 39-D, however, that the death penalty is *automatically*

required in the killing of a police officer, it did not appear that a case such as appellant's would qualify as "an appropriate case" in which to reject the death penalty. In answer to question 55, Juror 7877 stated that he "disagreed somewhat" with the statement that all intentional killers should get the death penalty. (37 CT 10723-10724.)

(b) Juror 7017

Juror 7017 answered question 38 in the negative, but in answering question 39-D, Juror 7017 also responded that he believed that the State of California should automatically execute any person who is convicted of murder of a police officer who is engaged in the performance of his duties. (38 CT 10940.) Like Juror 7787, Juror 7017 also believed the death penalty should be automatic for any defendant convicted of murder. (*Id.*)

In response to question 49, Juror 7017 stated that, depending on the circumstances of the case and the penalty phase evidence, the juror could impose either death or life in prison without parole in a case in which it is alleged that the defendant killed a police officer in the performance of his duties. (37 CT 10942.)

Juror 7017 answered question 54(a) by stating that he could reject the death penalty in the appropriate case. But, on question 55, this juror "strongly agreed" that any intentional killer should *always* get the death penalty. The juror explained: "Why keep him alive in already over populated prisons." (38 CT 10942-10943.)

(c) Juror 10155

Juror 10155 also answered question 38 in the negative, but in answering question 39-D, Juror 10155 responded that he believed that the State of California should automatically execute any person who is convicted of murder of a police officer who is engaged in the performance of his duties. (38 CT 11079.)

In response to question 49, Juror 10155 stated that, depending on the circumstances of the case and the penalty phase evidence, the juror could impose either death or life in prison without parole in a case in which it is alleged that the defendant killed a police officer in the performance of his duties. (38 CT 11081.)

Juror 10155 also answered question 54(a) by stating that he could reject the death penalty "in the appropriate case." (38 CT 11081.) On question 55, this juror "agreed somewhat" that intentional killers should always get the death penalty, but explained that there "might be circumstances where you wouldn't give the death penalty." (38 CT 11081-11082.

(d) Juror 9466

Juror 9466 answered question 38 in the negative, but responded to question 39-D by placing a question mark next to the boxes, without filling in either box. (37 CT 10913 [Juror 9466].)

In response to question 49, Juror 9466 stated that, depending on the

circumstances of this case and the penalty phase evidence, the juror could impose either death or life in prison without parole in a case in which it is alleged that the defendant killed a police officer in the performance of his duties. (37 CT 10915.)

Juror 9466 answered question 54 by stating that, in the appropriate case, he could reject the death penalty. (37 CT 10915.) He answered question 55 by "agree[ing] somewhat" that intentional killers should always get the death penalty, explaining that it would make a difference to this juror if the killing was in self-defense or murder. (37 CT 10916.)

3. Alternate Juror Questionnaires

(a) Alternate Juror 12099

Alternate Juror 12099 answered negatively to question 38, but affirmatively to question 39-D, stating he too, believed that the death penalty should be automatic for defendants who murder a police officer. (37 CT 10832 [Juror 12099]. The juror answered question 49 by stating that he could not impose life without parole in such a case. (37 CT 10834.) The juror answered question 54 by stating that he could *never* see himself rejecting the death penalty and choosing life without parole. (38 CT 10834.) On question 55, he responded that he "agreed somewhat" that intentional killers should always get the death penalty, explaining that it should not be given when the killing is in self-defense. (38 CT 10835.)

(b) Alternate Juror 9719

Alternate Juror 9719 answered negatively to question 38, but affirmatively to question 39-D, stating he too, believed that the death penalty should be automatic for defendants who murder a police officer. (38 CT 11106.) In response to question 49, Juror 9719 stated that, depending on the circumstances of the case and the penalty phase evidence, the juror could impose either death or life in prison without parole in a case in which it is alleged that the defendant killed a police officer in the performance of his duties. (38 CT 111108.) This juror answered question 54 by stating that he could reject the death penalty in the appropriate case, but stated in response to question 55 that he "strongly agreed" that intentional killers should *always* get the death penalty. He explained that "I feel outrage at people who intentionally kill other people." (38 CT 11109.)

4. The Court's Voir Dire

The judge met with the parties on March 17, 2005 to discuss the questionnaires and jury selection. (5 RT 1182 et seq.) The judge explained that, as to death qualification, he would simply ask six questions:

"Number one:	Do you hold strong views in support of or in opposition to the death penalty as a punishment for murder?
Number two:	Do you have an open mind on the death penalty determination?

Number three: If a defendant were found guilty of first degree murder and a special circumstance were found to be true could you as a juror consider as a possible punishment: A, death; B, imprisonment for life without parole?

Number four: Would you automatically vote for the death penalty in every case of murder in the first degree no matter what the evidence may be?

Number five: Would you automatically vote against the death penalty in every case of murder in the first degree no matter what the evidence may be?

Number six: Is there any reason why you might not be able to be fair and impartial or might not be able to follow the Court's instructions in a case which may involve a possible death penalty?"

(5 RT 1182-1183.)

The judge told the parties that after he asked these questions, he would permit them to explore with the jurors their answers from the questionnaire and their answers to the court's six questions. (5 RT 1184.)

Mr. Reichle, appellant's advisory counsel, told the court that he had particular concern with question 39-D of the questionnaire. He noted that appellant had filed a brief a on March 17, 2005 regarding the scope of voir dire (9 CT 2171-2174), in which appellant had argued that this court's decision in *People v. Cash* (2002) 28 Cal.4th 703, required the trial court in a capital case to permit voir dire on whether, in view of key facts in the case, the juror would automatically impose the death penalty. Appellant's brief argued that he should be given "considerable leeway in asking potential jurors, for instance, whether

they personally would automatically impose the death penalty based on the facts described in Question 39(d) since those are the facts of this case ...." (9 CT 2174.)

In response to Reichle's concern with answers to question 39-D, the court stated that it had no problem with counsel exploring that question with the jurors. (5 RT 1185.) The court suggested that appellant could simply "ask that question to the panel as a whole. 'If you would automatically vote for the death penalty any time a police officer was killed, raise your hand.' And you can explore that with that juror and you can talk to those jurors." (5 RT 1186.)

On March 22, 2005, the trial court conducted voir dire of the potential jurors. Prior to bringing in the jurors, the judge reviewed with the parties the process he would use. The judge noted that he wanted to probe "inconsistencies" in answers to the juror questionnaires. "I saw a lot of inconsistencies that I think I need to try and understand where they are coming from with those inconsistencies. Question 39 was often inconsistent with Question 54, and so on. I need to try and clarify those areas and see where they are. And I will do that." The judge stated that he would begin by examining the jurors on their death penalty qualification, and then permit counsel to examine the jurors for cause. (6 RT 1200-1201.)

Consistent with what the court had told the parties, it limited its questions on death qualification to the six questions quoted above. However, contrary to its stated intention, the court never examined the jurors for inconsistencies in the answers it had previously adverted to. The court's voir dire of Juror 7877

regarding death qualification illustrates the *pro forma* questioning the court followed. The entirety of that questioning of Juror 7877 was as follows:

> THE COURT: Do you hold strong views in support of or in opposition to the death penalty as a punishment for murder?
>
> REDACTED JUROR 7877: Yes.
>
> THE COURT: Do you have an open mind on the death penalty determination?
>
> REDACTED JUROR 7877: Yes.
>
> THE COURT: If a defendant were found guilty of first degree murder and a special circumstance were found to be true, could you, as a juror, consider as a possible punishment death?
>
> REDACTED JUROR 7877: Yes.
>
> THE COURT: Imprisonment for life without parole?
>
> REDACTED JUROR 7877: Yes.
>
> THE COURT: Would you automatically vote for the death penalty in every case of murder in the first degree, no matter what the evidence might be?
>
> REDACTED JUROR 7877: No.
>
> THE COURT: Would you automatically vote against the death penalty in every case of murder in the first degree, no matter what the evidence may be?
>
> REDACTED JUROR 7877: No.
>
> THE COURT: Is there any reason why you might not be able to be fair and impartial or might not be able to follow the Court's instructions in a case which may involve the possible death penalty?
>
> REDACTED JUROR 7877: No.
>
> THE COURT: Thank you, [Redacted Juror 7877].

(6 RT 1244-1245.)

The court asked the same six questions and received the same monosyllabic responses from seated Juror 7017 (6 RT 1250-1251); seated Juror 10155 (6 RT 1273-1274); seated Juror 9466 (6 RT 1302-1303); and Alternate Juror 9719 (6 RT 1325-1326).

Despite the fact that these four seated jurors and two alternates all responded affirmatively to question 39-D, stating their belief that all defendants who kill a police officers should automatically be put to death, the court asked only one of these prospective jurors, Alternate Juror 12099, about that response. (6 RT 1329-1331.) Under the court's questioning, Alternate Juror 12099 corrected his response and stated that he did not believe the death penalty should be automatic for persons who murder a police officer. (6 RT 1330.) The court also asked Alternate Juror 12099 about his answer to question 54, in which he responded that, given two options, he would not reject the death penalty. Again, under the court's questioning, the juror stated that "I would consider both [options], but I would always lean more towards death." (6 RT 1331.)[15]

The prosecution did not ask any of the four seated jurors and three

---

[15] The court also questioned prospective juror Charlene Lauppe about her answer to question 39, in which she stated that the death penalty should be automatic for multiple murderers, (6 RT 1327-1328.) Ms. Lauppe agreed that that circumstance was not involved in appellant's case. (6 RT 1328-1329.)

The court also asked Alternate Juror 9719, whose husband had been murdered, if "As far as the issue of the death penalty you believe you can deal with that issue on a fairly rational basis?" The juror responded, "yes". The court then asked, "And based on this case whether it could be life without parole?" The juror again responded, "yes". (6 RT 1327.)

alternate jurors about their affirmative response to question 39-D. Nor did the prosecution ask seated Juror 7877 or seated Juror 7017 regarding their affirmative response to question 39-B, stating their belief that all murderers should be put to death.

Appellant asked four prospective jurors, none of whom sat on the jury or were selected as alternates, about their affirmative responses to question 39-D. (Prospective Jurors Vance [6 RT 1290]; Worsley [6 RT 1293]; Matteson [6 RT 1295-1296]; Cobb [6 RT 1332-1333].) Appellant did not question any of the seated or alternate jurors who answered affirmatively to questions 39-B or 39-D, about those responses.

At the end of jury selection, four seated jurors and one alternate juror were impaneled on the jury, even though: (1) they had stated in their questionnaires that they believed the State should "automatically put to death" any defendant who was convicted of the murder of a police officer engaged in his duties; and (2), had not repudiated or modified that assertion during voir dire.[16] While these jurors indicated in response to question 49 that, in a case in which it is "*alleged*" that a defendant killed a police officer in the performance of his duties, they could impose the death penalty or life without parole, such answer did not repudiate their categorical answer to question 39-D, in which they stated their belief that the State should automatically put to death a defendant *convicted* of that crime. As explained below, these jurors therefore

---

[16] As noted above, only Alternate Juror 12099 was asked about the affirmative answer to question 39-D, and repudiated it.

suffered a disqualifying actual bias, which requires reversal of their death verdict.

C. The Trial Court Violated Appellant's Constitutional Right To An Impartial Jury By Failing to Investigate And Remove The Four Seated Jurors Who Stated Under Penalty Of Perjury That They Believed The State Should Automatically Put To Death A Defendant Who Kills A Police Officer Engaged In His Duties.

1. Appellant Had a Sixth and Fourteenth Amendment Right To a Trial By An Impartial Jury.

The Sixth Amendment of the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." The Fourteenth Amendment extends this guarantee to defendants tried in state court. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 149.) The Fourteenth Amendment also guarantees defendants a "due process right to a competent and impartial tribunal," (*Peters v. Kiff* (1972) 407 U.S. 493, 501, plurality opn.) In *Smith v. Phillips* (1982) 455 U.S. 209, 217, the Supreme Court reaffirmed this position, stating that "due process means a jury capable and willing to decide the issue solely on the evidence before it."

In California, where the death penalty law "provides for a sentencing verdict by a jury, 'the due process clause of the Fourteenth Amendment of the federal Constitution requires the sentencing jury to be impartial to the same extent that the Sixth Amendment requires jury impartiality at the guilt phase of the trial.'" (*People v. Earp* (1999) 20 Cal.4th 826, 852, quoting *People v. Williams* (1997) 16 Cal.4th 635, 666, citing *Morgan v. Illinois* (1992) 504 U.S.

719, 726-728 and 740 (dis. opn. of Scalia, J.).

2. A Capital Jury Is Not Impartial If It Contains Jurors Who, On The Facts Of The Case, Would Automatically Impose The Death Penalty.

Both the United States Supreme Court and this court have long recognized that a juror who, on the facts of the case, would automatically impose the death penalty is not an impartial juror. As the Supreme Court explained in *Morgan v. Illinois* (1992) 504 U.S. 719:

> A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence.

(*Id.* at p. 729.)

This court has echoed the holding of *Morgan v. Illinois:*

> Choosing a jury for a capital case poses a special problem. "The state and federal constitutional guarantees of a trial by an impartial jury include the right in a capital case to a jury whose members will not automatically impose the death penalty for all murders, but will instead consider and weigh the mitigating evidence in determining the appropriate sentence. [Citation.] "[A] juror may be challenged for cause based upon his or her views concerning capital punishment only if those views would 'prevent or substantially impair' the performance of the juror's duties as defined by the court's instructions and the juror's oath."

> [Citations.] If the death penalty is imposed by a jury containing even one juror who would vote automatically for the death penalty without considering the mitigating evidence, 'the State is disentitled to execute the sentence.'"

(*People v. Roldan* (2005) 35 Cal.4th 646, 690, quoting *Morgan v. Illinois, supra,* 504 U.S. at p. 729.)

It is therefore clear that, "Any juror to whom mitigating factors are . . . irrelevant should be disqualified for cause." (*Morgan v. Illinois, supra,* 504 U.S. at p. 739.) Although normally a biased juror is thought of as one who is predisposed against or in favor of the defendant, the label "biased" also applies to a juror "who cannot 'conscientiously apply the law and find the facts.'" (*Franklin v. Anderson* (6th Cir. 2006) 434 F.3d 412, 421, quoting *Wainwright v. Witt* (1985) 469 U.S. 412, 423.

California implements this constitutional guarantee of an impartial jury through its statutes governing the challenge to, or discharge of, biased jurors. Code of Civil Procedure, section 225 permits a challenge to a trial juror based on "actual bias." (Code Civ. Proc., § 225, subd. (b)(1)(C).) "Actual bias" is defined as "the existence of a state of mind on the part of the juror in reference to the case ... which will prevent the juror from acting ... without prejudice to the substantial rights of any party." (*Id.*) Once a juror is seated, the juror may be discharged if the juror "is found to be unable to perform his or her duty ...." (Penal Code § 1089.)

In the context of a capital case, a juror is actually biased if the juror's

views on capital punishment may prevent that juror from deliberating on the legal standard and the facts of the case. This court has explained that "[a] sitting juror's actual bias, which would have supported a challenge for cause, renders him 'unable to perform his duty' and thus subject to discharge and substitution...." (*People v. Lomax* (2010) 49 Cal.4th 530, 589, citing *People v. Keenan* (1988) 46 Cal.3d 478, 532.) A juror in a death case who would automatically vote for the death penalty is "unable to perform his duty" under the law. "A juror may be disqualified for bias, and thus discharged, from a capital case if his views on capital punishment 'would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." ' (*Wainwright v. Witt,* [supra,] 469 U.S. [at p.] 424, quoting *Adams v. Texas* (1980) 448 U.S. 38, 45; see also *Witherspoon v. Illinois* (1968) 391 U.S. 510, 521–522 .)" (*Keenan*, 46 Cal.3d at p. 532.) "A refusal to deliberate consists of a juror's unwillingness to engage in the deliberative process; that is, he or she will not participate in discussions with fellow jurors by listening to their views and by expressing his or her own views. Examples of refusal to deliberate include, but are not limited to, expressing a fixed conclusion at the beginning of deliberations and refusing to consider other points of view, refusing to speak to other jurors, and attempting to separate oneself physically from the remainder of the jury." *(People v. Cleveland* (2001) 25 Cal.4th 466, 485.)

It is clear from the foregoing authorities that a juror who would

automatically vote to impose the death penalty on the facts of the case before him exhibits actual bias, and should be removed from the jury. If the juror is not removed, "the State is disentitled to execute the sentence." (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 729.)

As explained below, four seated jurors in appellant's case were biased in this manner, and the death judgment must be reversed.

3. The Sworn Statements Of Seated Jurors 7877, 7017, 10155 And 9466, That That They Believed The State Should Automatically Put To Death a Defendant Who Is Convicted Of Murdering a Police Officer, Required The Trial Court To Investigate And Dismiss, Pursuant to Penal Code § 1089, These Jurors Who Were Unable To Perform Their Duties

In sworn statements, seated Jurors 7877, 7017, 10155 and 9466, all stated that they believed that the death penalty should automatically apply to a defendant who is convicted of murdering a police officer engaged in the performance of his duties. Two of the seated jurors, Jurors 7877 and 7017, further stated that defendants who commit any murder should also automatically be sentenced to death. These statements constituted grounds for discharge for cause. That is because a juror who would automatically vote to impose the death penalty for murder, or for certain types of murder, will not "consider and weigh the mitigating evidence in determining the appropriate sentence." (*People v. Roldan, supra*, 35 Cal.4th at p. 690.)

These jurors were subject to challenge for cause despite their further

answers to questions 38 and 49. In response to question 38, these jurors indicated that if the jury found a defendant guilty "of intentional first degree murder and found a special circumstance to be true," they would not "always *vote for death*, no matter what other evidence might be presented at the penalty hearing in this case." Question 38 did not identify any particular special circumstance. Instead, the question asked generally about how the juror would evaluate *a special circumstance*, not the particular special circumstance of the murder of a police officer. A juror might be willing to consider life in prison or death with respect to any number of special circumstances. But in their response to the following question, 39-D, these jurors made it crystal clear that their willingness to consider alternate penalties for a special circumstance case did not apply where the special circumstance was murder of a police officer.

Nor did the jurors' answers to question 49 indicate an openness to alternative penalties following a murder conviction and a finding of the special circumstance of the killing of a police officer. Unlike question 39, question 49 asked the jurors about a case that "*alleges* the special circumstances that ... a police officer ... was intentionally killed while engaged in the performance of his duties and that the defendant knew and reasonably should have known that ... a peace officer ... was engaged in the performance of his duties." Question 39, by contrast, did not ask the juror to consider mere allegations. It specifically asked whether the juror believed the State should automatically put to death any defendant "*convicted* of murder plus the murder was of a peace officer while the peace officer was engaged in the performance of his duties."

A juror's willingness to consider alternate penalties where it is simply alleged that the murder victim was a police officer engaged in his duties

signified only that the juror was willing to adhere to the presumption of innocence. Indeed, the jurors were specifically asked in a previous question, number 21(c), whether they understood that "in a criminal case the defendant is presumed to be innocent and that the People must prove guilt beyond a reasonable doubt?" (8 CT 1963.) Question 49 thus simply asked for the juror's views on an willingness to consider the penalty of life in prison "depending on the circumstances of the case" and before the allegations were proven. But as the juror's response to question 39-D indicates, once the defendant was *convicted* of murder of a police officer and the special circumstance found true, the jurors believed that the death penalty should be automatic. Had question 49 asked whether, if the jury *actually convicts* the defendant of the premeditated murder of a police officer, and *finds true* the special circumstance that the officer was engaged in the performance of his duties, the juror could impose a penalty of life without parole, then a juror's affirmative response would have qualified the affirmative answer to question 39-D. But by merely asked for the juror's views on unproven allegations, the answers to question 49 did not qualify the jurors' stated belief that convicted murderers of police officers should automatically be put to death.

Nor did any of the court's standardized six questions, asked of each juror on voir dire, change or qualify the jurors' affirmative answer to question 39-D. The first two questions the court asked each juror merely determined that the jurors may have had "strong views" on the death penalty (question one), and an

"open mind on the death penalty determination" (question two).[17] These two questions are entirely general, and neither question indicates whether a juror would automatically impose the death penalty for the particular special circumstance of the murder of a police officer.

The court's third question was equally general: "If a defendant were found guilty of first degree murder and a special circumstance were found to be true, could you as a juror consider as a possible punishment: A, death; B, imprisonment for life without parole?" Again, the question asks about "*a* special circumstance." It does not inquire about the particular special circumstance addressed in question 39-D. The court's fourth and fifth questions were "Would you automatically vote for the death penalty [or life without parole] in every case of murder in the first degree no matter what the evidence may be?" These questions, too, did not isolate the juror's views on the special circumstance of murder of a police officer. A juror could respond to this fourth question by stating that they would not vote for death in every first degree murder case, and still believe that if the victim was a police officer engaged in the performance of his duties, the death penalty should be automatic.

The court's sixth question was "Is there any reason why you might not be able to be fair and impartial or might not be able to follow the Court's instructions in a case which may involve a possible death penalty?" Here, too,

---

[17] In fact, Juror 7877 did have "strong views" on the death penalty, but was not asked about those views. (6 RT 1244-1245.)

the question was general in nature and the responses monosyllabic. The court did not specify in that question any particular instruction the juror might be asked to follow. The questionnaire did reference various instructions, but none of which directly pertained to the imposition of the death penalty. Thus, question 53 asked whether the potential juror could "follow an instruction by the Court to refrain from discussing the question of the death penalty during the trial of this case until the penalty phase is concluded." (8 CT 1966.) Question 54, quoted above, merely told the jurors that "there are no circumstances under which a jury is instructed to return a verdict of death," and that the "jury is always given the option in the penalty phase of choosing life without possibility of parole." (*Id.*) This instruction only told the jurors that they have two options. It did not tell them that they must weigh and consider both options, or tell them what were the factors that must be weighed and considered.

Question 54 then went on to ask whether, "[g]iven the fact that you will have two options available to you, can you see yourself, in the appropriate case, rejecting the death penalty and choosing life imprisonment without the possibility of parole instead?" The operative phrase in this portion of question 54 is, "in the appropriate case." A juror who answered question 39-D in the affirmative could, of course, choose life "in an appropriate case." But a case in which the defendant murdered a police officer in the performance of his duties would not, in the juror's view, constitute "an appropriate case" for that disposition.

Finally, questions 95 through 100 concerned "Instructions On The Law."

These questions informed the jurors about instructions on the testimony of one witness (question 96), the presumption of innocence (question 97), and the defendant's right not to testify (question 98 and 99). Question 95 asked how the jurors would "deal with a conflict" in which "the judge gives you an instruction on the law that you feel is different from a belief or opinion you have." None of these instructions addressed or implicated the concerns raised by question 39-D.

Thus, neither the court's oral questioning of the jurors, nor the other questions on the questionnaire sufficiently probed or qualified the jurors' affirmative answer to question 39-D. Those jurors who answered that question by affirming their belief that the State should automatically put to death a defendant who is convicted of murdering a police officer engaged in his duties, remained fully subject to challenge for cause for actual bias.

As stated above, the record indicates that appellant did not challenge these jurors for cause and did not exhaust his peremptory challenges. Nor does the record indicate why appellant chose not to challenge these jurors, particularly after appellant and his advisory counsel told the court that they were concerned with the jury venire's answers to question 39-D on the questionnaire.

Appellant is well aware that this court has held that a challenge for cause and exhaustion of peremptory challenges is ordinarily required to preserve a claim on appeal related to jury composition. (*People v. Taylor, supra*, 47 Cal.4th at pp. 883-884, and cases cited therein.) This rule, however, is subject

to an exception, articulated in *People v. Foster* (2010) 50 Cal.4th 1301, in cases in which a seated juror is actually biased. *Foster* was a capital case. The defendant argued on appeal that six seated jurors were biased against him because they favored the death penalty and would not weigh and consider all the mitigating factors. During jury selection, however, the defendant did not challenge these jurors for cause or exhaust his peremptory challenges. (*Id.* at p. 1325.) This court did not hold the claim waived on appeal, but instead explained:

> [A]lthough defendant did not challenge any of the seated jurors for cause and did not exhaust the peremptory challenges available to him, he contends the verdicts must be set aside because six jurors were biased against him. (See *Johnson v. Armontrout* (8th Cir.1992) 961 F.2d 748, 754 ["When a defendant fails to object to the qualifications of a juror, he is without remedy only if he fails to prove actual bias"].) "Actual bias" is "the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party." (Code Civ. Proc., § 225, subd. (b)(1)(C); *People v. Hillhouse* (2002) 27 Cal.4th 469, 488.)

(*Id.* at p. 1325.)

This court in *Foster* then proceeded to consider on the merits the claim that each of the six seated jurors were actually biased. (*Id.* at pp. 1325-1326.) The court concluded, however, that "[o]ur review of the record reflects that none of the six jurors challenged by defendant exhibited actual bias against

him."[18] (*Id.* at p. 1325.) The court noted that, while each juror had indicated on voir dire some preference for the death penalty or skepticism of mitigating evidence, upon further questioning each juror stated that they would in fact weigh and consider all the evidence. (*Id.* at pp. 1325-1326 [Juror 1 would "weigh and consider such factors"; Juror 3 "would weigh and consider the aggravating and mitigating factors"; Juror 7 would vote for the death penalty if the defendant "did the crime and deserves the death penalty"; Juror 10 "would not always vote for death and would consider aggravating and mitigating factors"; Juror 11 would "weigh and consider" all the evidence; and Juror 13 "was willing to weigh and consider all of the aggravating and mitigating factors"].)

Mr. Mickel makes the same claim as the appellant in *Foster*: namely, that a number of seated jurors were actually biased against him. But unlike the jurors in *Foster*, the seated jurors in appellant's case *never* stated that, in a case in which the defendant was convicted of murdering a police officer engaged in the performance of his duties, they would weigh and consider mitigating factors. The questionnaire in appellant's case told the jurors that if they found appellant guilty of first degree murder and found true the special circumstance, the jury would be "required to decide the sentence of the defendant, based on additional evidence." (8 CT 1966 [Question 41].) At no time, did the court inform the prospective jurors of the factors that the law requires them to weigh and

---

[18] The court's use of the phrase "challenged by defendant" refers to the challenge on appeal, since the court had previously stated that "defendant did not challenge any of the seated jurors for cause...." (*Id.* at p. 1325.)

consider. While question 42 asked the jurors if they "believe that background information about a defendant is something relevant to the jury's consideration of penalty," (8 CT 1966), this question did not inform the jurors that they would be required to weigh and consider such information.

Indeed, the seated jurors who answered affirmatively to question 39-D, did not unequivocally state in response to question 42 that they would weigh and consider such "background information." To the contrary, Juror 7017 stated that it "shouldn't matter about what they did before – just this time." (38 CT 10941.) Juror 10155 stated "if the defendant is found guilty with special circumstances, it would show past tendencies toward violent acts." (38 CT 11080.) Juror 9466 stated that background information "may help to explain thought process." (37 CT 10914.) And Juror 7877 stated, "a person's history or background usually says something about that person." (37 CT 10722.)

Thus, unlike the jurors in *People v. Foster* who stated unequivocally that in selecting the appropriate penalty, they would weigh and consider the factors in mitigation and aggravation, the jurors in appellant's case did not state that they would weigh and consider mitigating evidence. Their adherence to the automatic imposition of the death penalty for defendants convicted of the murder of a police officer engaged in their duties, and their actual bias in the case, therefore remained undiminished. In view of the jurors' actual bias, even in the absence of appellant's challenge for cause or exhaustion of peremptory challenges, under *People v. Foster* this court may address the merits of appellant's claim that his jury contained jurors having an actual bias in violated

Morgan v. Illinois. (*People v. Foster*, *supra*, 50 Cal.4th at pp. 1326-1326. See also *Hughes v. United States* (6th Cir. 2001) 258 F.3d 453, 463 ["The impaneling of a biased juror warrants a new trial. If an impaneled juror was actually biased, the conviction must be set aside. *Johnson*, 961 F.2d at 754 (citing *Rogers v. McMullen*, 673 F.2d 1185, 1190 (11th Cir.1982), cert. denied, 459 U.S. 1110 (1983); *United States v. Crockett*, 514 F.2d 64, 69 (5th Cir.1975); *United States v. Silverman*, 449 F.2d 1341, 1344 (2d Cir.1971), cert. denied, 405 U.S. 918, 92 S.Ct. 943, 30 L.Ed.2d 788 (1972); *Ford v. United States*, 201 F.2d 300, 301 (5th Cir.1953).".)

4. Because Appellant's Jury Contained Persons Who, In Violation Of *Morgan v. Illinois*, Would Automatically Vote To Execute A Defendant Convicted Of The Murder Of A Police Officer, The Judgment of Death Must Be Reversed.

Morgan v. Illinois holds that "[i]f the death penalty is imposed by a jury containing even one juror who would vote automatically for the death penalty without considering the mitigating evidence, 'the State is disentitled to execute the sentence.'" (*Morgan v. Illinois, supra,* 504 U.S. at p. 729; *People v. Roldan* (2005) 35 Cal.4th 646, 690.)

Appellant's jury contained not just one such juror, but four. The judgment of death must therefore be reversed.

VIII. THE TRIAL COURT DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHT TO TESTIFY IN HIS OWN DEFENSE BY PROHIBITING APPELLANT FROM PRESENTING "HIS OWN VERSION OF THE EVENTS IN HIS OWN WORDS."

A. Summary of Argument

Appellant told the court that he wanted to testify in his own defense at the guilt phase to explain what he did and why he did it. However, based on appellant's internet postings following the crime, the trial court was concerned that appellant wanted to use his testimony to make a political statement, which the court feared would be irrelevant to the issues at trial. The court therefore required appellant to make an offer of proof, *in camera*, as to his proposed testimony. Following appellant's offer of proof, the trial court ruled that appellant's proposed testimony was indeed irrelevant and would not be permitted. Appellant thus did not testify at the guilt phase. As explained below, the trial court's ruling violated the fundamental, constitutional right of "an accused ... to present his own version of the events in his own words." (*Rock v. Arkansas* (1987) 483 U.S. 44, 52.) Because the error is structural, reversal is required.

B. Relevant Facts

Mr. Mickel was granted the right to represent himself on December 8, 2003. At a pretrial hearing on May 10, 2004, appellant told the court that "I fully intend to testify at the trial." (2 RT 271.) Because appellant was representing himself, he inquired whether the court would permit a narrative form of testimony or preferred question and answer. (*Id.*) The court deferred

a decision on that question. (*Id.*)

At a further pretrial hearing on March 1, 2005, the court and parties again discussed appellant's testimony. The court began the discussion by stating the following:

> THE COURT: Okay. Now let me tell you a problem I am having with the case, and that was the issue regarding how Mr. Mickel would testify, should he elect to testify. I am having a concern in my own mind as to how to arrange opening statements in this case, and how that's going to happen, and what is going to be allowed to be discussed during the opening statements. So I think we need to go there now. And I will tell you my thoughts, and I will allow you to address it, and we will see where we end up.
>
> First of all, as I indicated a couple times ago, I was very concerned about the theory of justification that was advanced in some proposed changes in the jury questionnaire by Mr. Mickel. And I have tried to research available legal theories that falls in the category of justification for the alleged offense, and tried to fit that within the framework of what I see as a potential defense or defenses in this case.
>
> I will tell you I have reviewed all of your papers fairly carefully. I see two theories being advanced by way of the Web postings. One theory is that Mr. Mickel incorporated himself, and he is entitled to corporate immunity.
>
> And the second theory is that Mr. Mickel was making a statement to protest police brutality. And that that would be his theories of justification for the alleged criminal conduct.
>
> If those are the theories of the Defense, the Court does not see at this time how those would ever be admissible in this proceeding for any purpose until we get to the penalty phase. At the guilt phase, I don't see those being recognized or being admissible for any purpose.

(3 RT 664.)

Mr. Mickel responded that he did not intend to rely on either of the two defenses the court mentioned – corporate immunity or a justification based on police brutality. (3 RT 665.) The court then stated that it remained "very concerned as to what is going to be presented to this jury." The court reiterated that "I think I have an obligation under the law to insure that only legally recognized defenses are presented to the jury. I should not and I don't plan on allowing improper evidence to be presented during the course of the trial, inadmissible evidence." (3 RT 666.) The court stated that, in light of appellant's internet postings and his renunciation of the corporate immunity and police brutality defenses, "I am kind of hard-pressed to see where the Defense is coming from." (*Id.*)

Because of the court's concern with the substance of appellant's testimony, the court told appellant that "if you elect to testify, I would have to have an offer of proof as to what you are going to testify to." (3 RT 667.) The court explained:

> But I have to know where it is going to go. I can't just let you start a story, for use of a better term, and not have any way to control the progress of that testimony. So I'm struggling with that one. So if you can help me, I'm listening. But I think I would have to have an offer of proof before I can allow you to testify, in light that I don't see any defense based on what you have done so far. And I don't know how you deal with that. The opening I am troubled with; and if you should elect to testify, I am having trouble with, also.

(3 RT 667.)

Mr. Mickel then assured the court that in his opening statement he would not discuss his political views, but would confine himself to the facts of the case. (3 RT 670-671.) Still concerned, the court then suggested that Mr. Mickel submit a draft of his opening statement *in camera* for the court to review. (3 RT 674.) Advisory counsel then introduced the question whether the court's procedure would violate *Brooks v. Tennessee* (1972) 406 U.S. 605, in which the Supreme Court held that a state rule of procedure requiring the defendant to be the first witness in a defense case would violate the Fifth Amendment. (3 RT 675-676.) The court indicated that it was not, at that immediate time, "asking Mr. Mickel to tell me what he is going to testify to, if he testifies. I am not asking him to make an election now whether he testifies or not. All I am asking is, we need to clarify what's going to be said in opening statement to make sure it's admissible." (3 RT 676.)

Appellant agreed to submit a sealed version of his intended opening statement for the court's review. (3 RT 678.)

The court then reiterated that it did "want an offer of proof as to what you are going to testify to in advance, so that we know that the material you are testifying to is relevant to this case." (3 RT 684.) The court explained:

> I think [an offer of proof] is the only way that I can, with the structure of this case right now, I think that is the only way to protect the record, is to know what you are going to be testifying to before I allow you to testify. So I would require right now, subject to further consideration of that when it comes up, an offer of proof. That's the tentative ruling on that one: to allow a narrative, with an offer of proof beforehand."

(3 RT 685.)

The matter was again discussed on March 17, 2005, during a break in jury selection. The court had apparently reconsidered its earlier position with respect to the opening statement. The court told the parties that "[i]t's the court's view that Mr. Mickel can make his opening statement. I am not going to ask him what it is in advance. " (5 RT 996.) The court adhered, however, to its position on Mr. Mickel's testimony: "If he decides to provide a defense, we will ask for an offer of proof at that time as to where we are going with it. And that's primarily based on the fact that when I look at the Web postings and see issues raised that are not recognized defenses, such as 'I was a corporation; therefore, I am immune from liability,' such as 'I want to make a political statement protesting police brutality,' not a legally, recognized defense, so those issues we are not going to." (5 RT 997.)

The prosecution rested its case on March 30, 2005. (8 RT 1762.) Appellant then filed two briefs with the court. (8 RT 1763.) One was entitled, "Brief re In Camera Hearing on Offer of Proof re Testimony." (9 CT 2348-2350.) The other was entitled, "Re Admissibility Of Defense, With Accompanying Proposed Order". (10 CT 2355-2390.)

Appellant's brief on the offer of proof stated only that, to avoid violating appellant's right to remain silent (the issue addressed in *Brooks v. Tennessee*), the court should take any offer of proof as to his testimony *in camera* and *ex parte*. (9 CT 2348 [arguing that "without conceding that the Court has the

authority to require an offer of proof in the circumstances of this case, it is clear that the Court can only do so *in camera* and *ex parte*," citing *People v. Galombos* (2002) 104 Cal.App.4th 1147, 1159, and *People v. Fries* (1979) 24 Cal.3d 222, 232-233.) (9 CT 2349.)

Appellant's 32-page brief on the admissibility of his defense, which set forth the matters to which he intended to testify, was considerably more detailed. To understand the thrust of this brief, it is necessary to put it in the context of appellant's previous in-court statements and filings about about his defense.

On January 24, 2005, court reviewed the proposed jury questionnaire with the parties. (3 RT 532 et seq.) Mr. Mickel proposed the following question be included in the questionnaire:

> Knowing that Andrew Mickel, the Defendant, killed Police Officer David Mobilio, and knowing that he has admitted to killing Officer Mobilio, can you listen to Mr. Mickel's justification for his actions, and consider it in determining whether or not he is guilty of murder?

(3 RT 557.)

The court said that it did not understand what Mr. Mickel meant by the term "justification." (*Id.*) Mr. Mickel responded, "I have no intention of – I never have denied that I killed Officer Mobilio, and I never intend to deny that. And it will become clear to the jury, both by myself and by the Prosecution, that there is no question of that fact." (*Id.*) In view of the fact that appellant

admitted to killing Officer Mobilio, the court asked "why are we having a trial on that question?" (3 RT 558.) Mr. Mickel responded, "I have an affirmative defense, Your Honor." (*Id.*)

The court stated that it would consider the matter of appellant's proposed stipulations and his affirmative defense at a subsequent hearing on *in limine* motions. (3 RT 561-562.)

On February 4, 2005, prior to the *in limine* proceedings, appellant filed a document entitled "Defendant's Proposed Stipulations." (8 CT 1982-1984.) In this pleading, appellant offered to stipulate to every material fact in the prosecution's case. Appellant offered 14 detailed stipulations, the first three of which were the following:

1. On the 19th of November, 2002, at approximately 1:35 a.m., Warner's Petroleum in Red Bluff California, I, Andrew Mickel, ambushed and shot Officer David Mobilio, twice diagonally in the side of his back and once in the back of the head, thereby killing him.

2. Officer Mobilio was on duty at the time he was shot and I was aware that he was on duty.

3. I, Andrew Mickel, personally conceived, constructed, and left at the scene, the canvas rattlesnake flag which states, "This was a political action. Don't tread on us."

(8 CT 1982.)

Appellant offered additional stipulations that the incriminating evidence found in his apartment all belonged to him; that he bought the Sig Sauer handgun used to kill Officer Mobilio; that he disposed of the gun in the trash at

a convenience store in Oregon; that he made internet postings after the killing including the "Declaration of a Renewed American Independence" and "Proud And Insolent Youth, Incorporated;" and that after killing Officer Mobilio, he traveled from Red Bluff to New Hampshire where he stayed in a hotel until he was arrested. (8 CT 1983-1984.)

At the hearing on appellant's proposed stipulations, Mr. Mickel told the court that "a majority of the issues that the Prosecution intends to address at trial I am willing to stipulate to as fact and to be true." (2 RT 269.) The prosecution, however, refused to accept the stipulations because they did not address appellant's intent and did not include a stipulation that appellant's shooting of Officer Mobilio was unlawful. (3 RT 606-608.) Appellant refused to stipulate to these two facts, and his stipulations were therefore rejected in their entirety. (3 RT 609.)

Against this background, Mr. Mickel submitted his brief containing the offer of proof on his affirmative defense.

Mr. Mickel's brief stated that appellant's defense was premised on a variety of constitutional provisions, including Article 1, section 1, of the California Constitution which provides that among the "inalienable rights" are the right of "defending life and liberty." (9 CT 2355.) Appellant's thesis was that since California has enacted statutes providing for self-defense to protect life, a similar right should be implied for the defense of liberty. (9 CT 2356-2357.) Appellant then stated that his conduct "which underlies the charges in

this case [was] an action in defense of liberty." (9 CT 2360.)

The brief asserted that "a government that has enacted statutes beyond its inherent authority, to infringe upon the liberties of its citizens, may legitimately be defended against." (9 CT 2366.)

The brief then sought to locate the defense of liberty in various other constitutional provisions and the Federalist Papers. The brief asked the court to take judicial notice of Paul Revere's Midnight Ride, the Shot Heard Around the World, the conduct of the British governor of colonial Massachusetts in 1775, and various actions taken by the colonists against the British in the Revolutionary War. (9 CT. 2366.) The brief argued that Article 1, section 1, of the California Constitution "would protect the rights of these colonists, and guarantee them an opportunity to present a defense, during the guilt phase that they were acting in defense of liberty." (9 CT 2368.)

Turning to the charges against him, appellant stated in the brief that the killing of Officer Mobilio was justified "to defend against laws which have significantly infringed upon the liberties of the American people." (10 CT 2361.) He stated that, while "the threat to liberty throughout society which defendant was defending against is engaged in by all of American law enforcement[,] ... Defendant targeted the least amount of law enforcement officers which would constitute an actual act of defense, that is, one individual." (9 CT 2379.) The brief stated that "Defendant has only used that force which he reasonably found necessary to be used in defense of liberty, and in no way

has defendant acted with any wanton disregard for life." (9 CT 2379.)

On April 1, 2005, the court conducted the *in camera* hearing to take appellant's offer of proof. (8 RT 1818-1832.) The court, appellant and advisory counsel were present. The People were excluded. The court began by questioning Mr. Mickel as to the contents of his legal memoranda. Under questioning from the court, appellant admitted that he had no prior contact with Officer Mobilio. (8 RT 1819.) When asked if he had any information as to anything Officer Mobilio had done which "needed to be remedied by this conduct," appellant said that he "specifically knew on November 19th that he was a police officer who was armed with a firearm and with handcuffs, and was willing to enforce laws that are destructive of liberties in society." (8 RT 1819.) Appellant then explained that while he had never seen Officer Mobilio before and had no knowledge about Officer Mobilio, this was the same "as the colonists who came to resist those Red Coats" whom they had never met and did not know. (8 RT 1820.) Such lack of knowledge "doesn't really matter, because those specific Red Coats were out in an attempt to enforce laws that were unjust and were oppressive. And so it doesn't matter really whether or not who those specific Red Coats were. What matters is what they were out on patrol attempting to do, which is they were attempting to abridge and infringe and destroy the colonists's right to bear arms." (8 RT 1820.)

The court pointed out that that political change may be achieved through the democratic system, and that "shooting a cop on the street isn't part of that system." (8 RT 1827.) Appellant responded:

> I would propose that I came forward in order to use the court system in order to have this right recognized. Because that's, that is how – that's typically how it works is that you, in order for Appellate Courts to recognize a right, is that somebody practices that right and then it goes to court.
>
> If you go to court and say, in order to guarantee a right that you haven't exercised, then the court is going to say, "All right, come back when you are arrested. You have no standing to challenge – to protect this right."
>
> I have exercised the right in order that I would have standing within the court system to protect that right. There's no other way to have done it, Your Honor. That is how the system works. I have to have standing in order to claim that I was exercising that right.

(8 RT 1827-1828.)

The court told appellant that, while his theories may make "interesting discussion," they do not "rise to the level of a defense in a criminal action ...." (8 RT 1829.) The court explained, "And it appears to the Court that the defense is a political statement. And I can't allow that because I can't allow a defense to go to the jury that are not cognizable in the law. I can't instruct on them. And therefore the evidence as to those theories are irrelevant." (8 RT 1830.)

Mr. Mickel then stated that "I feel very strongly that that's an incorrect ruling and that you should not make that ruling ... And I would like to give the Court notice that I intend to sit in silent protest during the guilt phase, and I will not speak or raise any issues until the penalty phase." (8 RT 1830.)

The court noted that "the record should reflect that Mr. Mickel is very

emotional at this time," (8 RT 1830), and asked if appellant wanted some time to reconsider his position. Mr. Mickel replied "I think we are finished, Your Honor." (8 RT 1830-1831.) He then stated that no defense would be offered. (8 RT 1830.)

Back in open court, the court noted that the defense had rested. Mr. Mickel then said that "I do have evidence to present, you Honor, but as per your ruling it has been ruled inadmissible as to – during the guilt phase. So I have no evidence that I am permitted to admit at this point." (8 RT 1836.)

The People then put on the record their view of the consequences of Mr. Mickel foregoing any defense. (8 RT 1843.) The People noted that Mr. Mickel had previously asked the court not to instruct on any lesser included offenses to first degree murder. Because Mr. Mickel chose not to put on any evidence, "based on the evidence presented thus far and now at the close of all evidence being presented at trial for both prosecution and defense, the People contend that the Court is without substantial evidence of any other crime than first degree murder which would require the Court, regardless of Defendant's stipulation or waiver of his rights, to instruct on any lesser included offenses of any kind. Based on such, the Court is not in a position to instruct on any lesser included offenses in this case." (8 RT 1844.) Appellant agreed that, without his defense evidence, there was no evidence to support instructions on a lesser included offense. (8 RT 1844.) Mr. Mickel acknowledged that "I have only one specific defense and that is the only defense that I consider relevant and that I could with any honesty and candor present as a defense, and there is nothing

else that I can really do at this point based on the Court's ruling." (8 RT 1845.)

C. The Trial Court's Exclusion Of Appellant's Proffered Testimony – Telling The Jury What He Did And Why He Did It – Deprived Appellant Of His Constitutional Right To Testify In His Own Defense.

As discussed above, the trial court excluded on relevancy grounds appellant's testimony regarding what he did in preparing and committing the offense (as set forth in his proposed stipulations), and why he did it (as set forth in his brief on the admissibility of his defense of liberty). The court's ruling thus precluded appellant from testifying in his own defense. This was constitutional error.

It is well established that the defendant has the constitutional right to testify on his own behalf. (*Rock v. Arkansas* (1987) 483 U.S. 44; *Ferguson v. Georgia* (1961) 365 U.S. 570.) In *Rock*, the Supreme Court held that a state rule excluding all testimony aided or refreshed by hypnosis, which precluded the defendant from taking the stand, violated the defendant's constitutional right to testify in her own defense. In *Ferguson*, the Supreme Court held unconstitutional a statute prohibiting a defendant from testifying because his interest in the outcome made him an incompetent witness. The court explained that "there was no rational justification for prohibiting the sworn testimony of the accused, who above all others may be in a position to meet the prosecution's case." (*Id.* at p. 582.)

According to *Rock* and *Ferguson*, "the right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution." (*Rock, supra,* 483 U.S. at p. 51.)

First, it is "one of the rights that 'are essential to due process of law in a fair adversary process." (*Id.*, quoting *Faretta v. California*, *supra*, 422 U.S. at p. 819, fn. 15.) The "necessary ingredients of the Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of law include a right to be heard and to offer testimony." (*Id.*, citing *In re Oliver* (1948) 333 U.S. 257, 273, and *Ferguson v. Georgia* (1961) 365 U.S. 570, 602 (conc. opn. of Clark, J. [Fourteenth Amendment secures the "right of a criminal defendant to choose between silence and testifying in his own behalf."].)

Second, "[t]he right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which which grants a defendant the right to call "witnesses in his favor," a right that is guaranteed in the criminal courts of the States by the Fourteenth Amendment. *Washington v. Texas*, 388 U.S. 14, 17-19 (1967)." (*Rock*, *supra*, 483 U.S. at p. 52.) *Rock* explained that "[l]ogically included in the accused's right to call witnesses whose testimony is "material and favorable to his defense," [citation], is a right to testify himself, should he decide it is in his favor to do so. In fact, the most important witness for the defense in many criminal cases is the defendant himself. There is no justification today for a rule that denies an accused the opportunity to offer his own testimony. Like the truthfulness of other witnesses, the defendant's veracity, which was the concern behind the original common-law rule, can be

tested adequately by cross-examination."

(*Id.* at p. 52.)

Significantly for purposes of the instant case in which the trial court gave Mr. Mickel the right to represent himself, *Rock* also noted that the right to testify was implied by the court's decision in *Faretta v. California*. *Rock* explained that in *Faretta*, "the Court recognized that the Sixth Amendment 'grants to the accused *personally* the right to make his defense.'" (*Id.* at p. 52.) *Rock* concluded that, as fundamental as is the right to self-representation recognized in *Faretta*, the right to testify in one's own defense is more fundamental:

> Even more fundamental to a personal defense than the right of self-representation, which was found to be "necessarily implied by the structure of the Amendment," *ibid.*, is an accused's right to present his own version of events in his own words. A defendant's opportunity to conduct his own defense by calling witnesses is incomplete if he may not present himself as a witness.

(*Id.*)

While the Supreme Court in *Rock* insisted on a defendant's constitutional right to testify, it held that such right is not unlimited:

> Of course, the right to present relevant testimony is not without limitation. The right "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." But restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve. In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation

imposed on the defendant's constitutional right to testify.

(*Rock*, *supra*, 483 U.S. at pp. 55-56 [citations and footnote omitted]. See *People v. Gutierrez* (2009) 45 Cal.4th 789, 821-822.)

The question in the instant case is whether the trial court's order, based on relevancy grounds, precluding appellant from "presenting his own version of events in his own words" was "arbitrary or disproportionate to the purpose[]" the relevancy doctrine "was designed to serve."

In analyzing this question, it is useful to consider the categories of evidence about which appellant sought to testify. Appellant's proffered testimony fell into two broad categories. First, consistent with his proposed stipulations, appellant sought to testify about the events immediately surrounding the shooting of Officer Mobilio. These events included appellant's purchase of the handgun, his selecting the site of the ambush, his act of shooting Officer Mobilio, his escape from the scene and his travel to New Hampshire where he was ultimately arrested.

The second category of appellant's proposed testimony described his motive for the shooting. This included his view that the government exercised tyrannical power over its citizens, and that its citizens had a consequent right – recognized in various constitutional provisions, political writings of the Founding Fathers, and historical events of the colonial period – to respond by taking up arms.

In short, appellant's testimony would have described the circumstances of the offense for which he was being tried, and his motive for committing that offense. Such evidence was manifestly relevant to the charges for which appellant was being tried, and exclusion of such testimony was therefore arbitrary.

Testimony regarding circumstances of the crime, particularly the defendant's statements describing the crime, are always relevant. As this court has held, "[t]here is no doubt that an incriminatory statement by the accused himself is relevant evidence, i.e., evidence having a 'tendency in reason' to prove the disputed facts, bearing on his guilt, to which the statement relates. (Evid.Code, § 210; see *People v. Jones*, *supra*, 17 Cal.4th 279, 326,(conc. opn. of Mosk, J.); see also *Culton*, *supra*, 11 Cal.App.4th 363, 374, 14 Cal.Rptr.2d 189 (conc. opn. of Timlin, J.).)" (See *People v. Alvarez* (2002) 27 Cal.4th 1161, 1174. See also *People v. Sanders* (1990) 51 Cal.3d 471, 514 [holding photographs relevant that showed location of victim's body and nature of wound]; *People v. Kelly* (1990) 51 Cal.3d 931, 963 [holding photographs relevant that showed wounds to establish that murder was intentional]; *People v. Kaurish* (1990) 52 Cal.3d 648, 683 [holding photographs of corpse relevant to identify defendant as perpetrator].) The exclusion of appellant's description of the crime on relevance grounds was therefore erroneous.

Similarly, it was erroneous to exclude as irrelevant appellant's testimony of his motive for the shooting. A defendant's motive, while not an element, is relevant in a murder prosecution. (See CALJIC (2005) No. 2.51 [permitting the

jury to "consider motive or lack of motive as a circumstance in this case."]; 1 Witkin, Cal.Crim.Law (2000) Elements, § 4 at pp. 202-203; *People v. Durrant* (1897) 116 Cal. 179, 208. See *People v. Beagle* (1972) 6 Cal.3d 441, 450 [absence of motive may impact jury's evaluation of the proof of essential elements]; *People v. Weatherford* (1945) 27 Cal.2d 401, 423 [absence of motive may be considered to support presumption of innocence].) Here, too, the trial court's wholesale exclusion of appellant's testimony regarding his motive as irrelevant had no basis in the law.

Appellant, of course, does not establish a constitutional violation simply by showing that the state court violated a state procedural rule by excluding his testimony based on relevance. *Rock v. Arkansas* requires more. It requires that appellant prove the trial court's action in precluding his testimony based on a theory of relevance was "arbitrary or disproportionate to the purposes they are designed to serve." (*Rock, supra*, 483 U.S. at pp. 55-56.)

What makes the trial court's ruling in appellant's case arbitrary was that the court arbitrarily applied a completely different rule of relevance for the prosecution than for the defense. Thus, the trial court permitted the prosecution to put on abundant evidence of the circumstances leading up to the shooting of Officer Mobilio, the circumstances of the shooting, and the aftermath of the shooting, including appellant's flight to New Hampshire. The trial court's ruling, however, precluded appellant from testifying as to these same matters.

The trial court also excluded appellant's testimony regarding his motive. Again, the trial court's ruling was based on an arbitrary application of relevance principles. The trial court permitted the prosecution to put on evidence regarding appellant's motive, including evidence the prosecution believed showed that the shooting was "a political action," (6 RT 1360 [People's Opening Statement], and that appellant committed the murder "[f]or some selfish, twisted, in his words 'political reason.'" (8 RT 1868 [People's Closing Argument].) As evidence that the killing was "a political action," the prosecution introduced extensive testimony about the flag, bearing the legend, "THIS WAS A POLITICAL ACTION – Don't Tread On Us" that appellant placed next to the body. (People's Exh. 32[19]; 7 RT 1477; 7 RT 1622-1623.)

The trial court thus permitted the prosecution to introduce evidence of appellant's political motive. But it held appellant's own testimony regarding that same motive to be irrelevant. This disparate treatment of the parties regarding the same matter has long been held to violate due process. (*Wardius v. Oregon* (1973) 412 U.S. 470, 474-475 ["This Court has therefore been particularly suspicious of state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial."].) It has also been held to constitute arbitrary treatment under the Equal Protection Clause. (E.g., *Walters v. City of St. Louis, Mo.*(1954) 347 U.S. 231, 237 [holding that Equal Protection Clause only requires that "the different treatments [for tax liability] be not so disparate,

---

[19] A photograph of the flag appears at 9 CT 2325.

relative to the difference in classification, as to be wholly arbitrary]; *Bush v. Gore* (2000) 531 U.S. 98, 104 [holding that "arbitrary and disparate treatment" violates the Equal Protection Clause].)

The trial court's disparate treatment of the parties regarding its relevance rulings, which precluded appellant from testifying in his own defense was arbitrary, and therefore violated his constitutional right to testify under *Rock v. Arkansas.*

D. The Error Was Prejudicial

Neither this court nor the United States Supreme Court have decided the appropriate test for prejudice for violation of a defendant's constitutional right to testify. The courts of this state, the federal courts, the sister-state courts are divided on the question.

The California decisions are divided on the issue. Compare *People v. Harris* (1987) 191 Cal.App.3d 819, 825 [error requires automatic reversal],[20]

---

[20] While the *Harris* court did not explicitly state that the error was structural, it did state that it had no choice but to reverse: "Inasmuch as our appellant was not accorded his constitutional right to testify [citation], we have no option but to reverse. Neither the good faith of the trial court, the well-advised tactical considerations of the defense counsel, nor even the seemingly overwhelming evidence of guilt will enable us to sustain a conviction founded upon such a deprivation." (*Id.* at p. 826.)

with *People v. Johnson* (1998) 62 Cal.App.4th 608, 636 [error subject to the *Chapman* test for prejudice].

The federal courts are also divided. (*Compare United States v. Butts* (D.Me. 1986) 630 F.Supp. 1145, 1148 [the error is structural, and therefore reversible *per se*], with *United States v. Taylor* (7th Cir.1997) 128 F.3d 1105, 1109 [the error is subject to *Chapman*] ; *Wright v. Estelle* (5th Cir. 1978) 572 F.2d 1071 [same]; *Palmer v. Hendricks* (3d Cir.2010) 592 F.3d 386, 398-99 [same].

The state courts are similarly divided. Several hold the error is structural. (*State v. Rosillo* (Minn. 1979) 281 N.W.2d 877, 879; *State v. Hampton* (La. 2002) 818 So.2d 720.) Several take a contrary view, that the error is subject to *Chapman*. (*Quarels v. Comm.* (Ky. 2004) 142 S.W.3d 73, 81; *Moman v. State* (Tenn. 1999) 18 S.W.3d 152, 166-167; *People v. Whiting* (Ill.App. 2006) 849 N.E.2d 125, 135; *State v. Silva* (1995) 890 P.2d 702, 712, overruled on other grounds in *Tachibana v. State* (1995) 900 P.2d 1293, 1302-1303; *People v. Solomon* (1996) 560 N.W.2d 651, 655; *State v. Flynn* (1994) 527 N.W.2d 343, 353.)

As appellant argues below, the deprivation of a defendant's constitutional right to testify in his own defense should be treated as structural error. But even if the error is subject to *Chapman*'s harmless error analysis, reversal is still required.

1. The Deprivation Of A Defendant's Constitutional Right To Testify In His Defense Is Structural Error.

In *Chapman v. California*, *supra*, 386 U.S. at p. 23, the Supreme Court stated that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." Examples there cited include right to counsel and right to an impartial judge. The Supreme Court has since added to that list of errors that are structural the denial under *Faretta v. California* of the right to self-representation. *(McKaskle v. Wiggins* (1984) 465 U.S. 168, 177.) As the court explained in *McKaskle*,

> Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to "harmless error" analysis. The right is either respected or denied; its deprivation cannot be harmless.

(*Id.* at p. 177, fn. 8. See also *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 148-149.)

In *Gonzalez-Lopez*, the court noted that its cases have designated errors as structural based on two separate criteria. First, an error may be structural and not subject to harmlessness review because the consequences of the deprivation "are frequently intangible, difficult to prove, or a matter of chance." (*Id.* at p. 149, quoting *Vasquez v. Hillery*, (1986) 474 U.S. 254, 263 ["[W]hen a petit jury has been selected upon improper criteria or has been exposed to prejudicial publicity, we have required reversal of the conviction because the effect of the violation cannot be ascertained."].) The court has explained that "this has not been the only criterion we have used. In addition to the above cases using

difficulty of assessment as the test, we have also relied on the irrelevance of harmlessness, see *McKaskle v. Wiggins*, 465 U.S. 168, 177, n. 8, 122 (1984)." (*United States v. Gonzalez-Lopez, supra*, 548 U.S. at p. 149, fn. 4.)

The theory behind the Supreme Court's designation of the denial of self-representation under *Faretta* as structural error is that, in the words of *Gonzalez-Lopez,* harmlessness is "irrelevant" because of the intrinsic value of the right. Thus, "[o]btaining reversal for violation of such a right does not require a showing of prejudice to the defense, since the right reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding. See *McKaskle v. Wiggins*, ante, at 177-178, n. 8. No showing of prejudice need be made to obtain reversal in these circumstances because prejudice to the defense is presumed." *Flanagan v. United States* (1984) 465 U.S. 259, 267-68.)

This is the rule for denial of the constitutional right of self-representation. But we know from the Supreme Court, itself, that it considers the right of a defendant to testify in his own defense to be *even more fundamental* than the right to self-representation. (*Rock v. Arkansas, supra*, 483 U.S. at p. 52 ["Even more fundamental to a personal defense than the right of self-representation, which was found to be "necessarily implied by the structure of the Amendment," *ibid.*, is an accused's right to present his own version of events in his own words. A defendant's opportunity to conduct his own defense by calling witnesses is incomplete if he may not present himself as a witness."].) If denial of the right to self-representation is structural error because of the

importance of that right, then *a fortiori*, the denial of the right of the defendant to testify is similarly structural error.

While, as appellant has pointed out, several courts have held to the contrary – that the deprivation of the right to testify is not structural error – those cases are not compelling precedent because they utterly failed to take into account the basis for structural error analysis articulated in *McKaskle v. Wiggins* and *United States v. Gonzalez-Lopez.* Some of these cases predated *McKaskle* and *Gonzalez-Lopez*, and therefore are not good law in view of their holdings. (*E.g., Wright v. Estelle* (5th Cir. 1978) 572 F.2d 1071.) Other of the decisions ignored *McKaskle* and *Gonzalez-Lopez*, and held that the error is subject to *Chapman* on the theory that the denial of the right to testify was like the exclusion of evidence generally, which is subject to harmless error analysis. (*People v. Johnson*, *supra*, 62 Cal.App.4th at p. 634; *United States v. Taylor*, *supra*, 128 F.3d at p. 1109; *Palmer v. Hendricks* (3d Cir. 2010) 592 F.3d 386, 399; *Quarels v. Com.*, *supra*, 142 S.W.3d at p. 81.) These cases, of course, focused only on one aspect of the structural error analysis – that aspect which seeks to determine whether the consequences of the error are "intangible" or "difficult to prove." (*Gonzalez-Lopez*, *supra*, 548 U.S. at pp. 148-149.)

Palmer v. Hendricks is a good example of the decisions that reason that "when a defendant states, 'I would have testified to X, Y, and Z, but my attorney would not put me on the stand,' the significance of such testimony can be evaluated in the context of the remainder of the evidence in order to assess the impact of the constitutional violation; this is precisely the type of

constitutional error that is amenable to conventional review in the context of the trial and evidence as a whole." (*Palmer v. Hendricks*, *supra*, 592 F.3d at p. 399, citing. *Gonzalez-Lopez*, 548 U.S. at 150.) While *Palmer* cited *Gonzalez-Lopez* to support its analysis, it only took note of one basis the Supreme Court articulated there for applying automatic reversal. *Palmer* simply ignored the alternative basis for structural error in *Gonzalez-Lopez*, which is that the harmlessness is "irrelevant" because of the intrinsic value of the right that may be either "respected or denied."

Gonzalez-Lopez and *McKaskle* insist on this second basis for structural error – where the right is so fundamental that the only relevant question is whether it is "either respected or denied." Because the decisions finding the *Chapman* applicable to the deprivation of the right to testify failed to consider this alternative ground for structural error, they have no precedential value.

The error is therefore structural and appellant's conviction must therefore be reversed.

2. The Error Also Requires Reversal Under *Chapman*

While the Supreme Court's decisions indicate that the erroneous deprivation of the right to testify is structural, this court need not reach the merits of that question. That is because the error is also reversible under *Chapman* because the People cannot show that the error was harmless beyond

a reasonable doubt.

"As a general matter, it is only the most extraordinary of trials in which a denial of the defendant's right to testify can be said to be harmless beyond a reasonable doubt. See *Luce v. United States*, 469 U.S. 38, 42 (1984) ('[An] appellate court [cannot] logically term 'harmless' an error that presumptively kept the defendant from testifying.')" (*Martinez v. Ylst* (9th Cir. 1991) 951 F.2d 1153, 1157.)

That is true of the instant case. While appellant's proposed testimony certainly qualified as "extraordinary" in the sense that he intended to admit fully to the shooting of Officer Mobilio, as proposed in his pretrial stipulations, that was not all appellant intended to testify to. As outlined above, he also intended to testify to his motive for the crime. This is the evidence that the jury should have heard, and that caused prejudice in its absence.

The trial court excluded the evidence of defendant's motivation because it believed that such evidence was relevant only to appellant's proposed "defense of liberty" – a defense which the trial court determined was not supported by the law. In fact, however, appellant's extensive description of his motive was relevant to establish a legally recognized basis for second-degree murder, and therefore would have required the trial court to instruct the jury on that lesser-included offense. The erroneous exclusion of this evidence therefore prejudiced appellant by removing the basis for that instruction.

The prosecution tried this case on the theory that appellant committed first degree murder by premeditation and deliberation. (8 RT 1868.) To establish murder, of course, the prosecution had to prove that appellant acted with malice. Malice may be negated by a showing that the homicide was committed in a heat of passion or provocation. The test of whether provocation or heat of passion can negate malice so as to mitigate murder to voluntary manslaughter is objective. *(People v. Steele* (2002) 27 Cal.4th 1230, 1254; *People v. Wickersham* (1982) 32 Cal.3d 307, 326, disapproved on another ground in *People v. Barton* (1995) 12 Cal.4th 186, 201.) Thus, "[N]o defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless ... the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable [person]." (*People v. Logan* (1917) 175 Cal. 45, 49.) In this respect, appellant's testimony of his motivation could not have negated malice, since his belief in the need to defend liberty by killing a police officer was entirely unreasonable, if not delusional.

But this sort of unreasonable and delusional thinking is not therefore irrelevant to the law of homicide. It is relevant, but only to the distinction between first and second degree murder. Thus, the courts have held that provocation or heat of passion can negate deliberation and premeditation so as to reduce first degree murder to second degree murder. (*People v. Padilla* (2003) 103 Cal.App.4th 675, 679.) But unlike the use of provocation or heat of passion to negate malice, use of those mental states to negate premeditation is "subjective." (*Id.*, citing *People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285,

1295; *People v. Valentine* (1946) 28 Cal.2d 121, 131-135 [169 P.2d 1].) That is to say, the heat of passion need not be reasonable.

People v. Padilla provides an instructive example. Padilla was charged with the murder of his cellmate. (Id. at p. 677.) The trial court rejected Padilla's attempt to admit the testimony of two psychologists that the killing was retaliatory after Padilla hallucinated that his cellmate killed Padilla's father and brothers. (*Ibid.*) The appellate court held that a subjective test applies to determine "whether provocation or heat of passion can negate deliberation and premeditation so as to reduce first degree murder to second degree murder ...." (Ibid.) The appellate court found that the jury could have concluded Padilla's hallucination provoked a heat of passion and reduced the murder from first degree to second degree. It therefore vacated the judgment of conviction on first degree murder. (*Id.* at pp. 678-679.)

In the same way, appellant's testimony that he killed Officer Mobilio because he was acting pursuant to the dictates of the Declaration of Independence, the Paul Revere's Midnight Ride, and the invasion of the Red Coats, was an entirely unreasonable delusion. But had the jury heard appellant, himself, explain this basis for his conduct, they would have had a basis for determining the absence of deliberation. As such, the trial court would have been obliged to instruct on the offense of second-degree murder. (*People v. Breverman* ((1998) 19 Cal.4th 142, 162-163 [trial court must "transcend the limitations of the adversarial system and give instructions which safeguard justice, society's interest in avoiding the unjustified exoneration of wrongdoers

and in punishing the defendant to the extent of his crime."].) The trial court would have had the obligation to instruct on second-degree murder even though appellant requested that the court forego instructions on lesser-included offenses. (*People v. Barton, supra*, 12 Cal.4th at p. 195.)

Further, there is some indication in the record that, so instructed, the jury would have harbored doubts about the existence of premeditation and deliberation. During appellant's testimony in the penalty phase, when he laid out his colonial-era inspiration for the killing, one juror sent the judge a note. The note stated:

"Was Mr. Mickel on drugs?" (10 CT 2599.)

The court showed the note to appellant prior to the close of evidence in that penalty phase. Appellant, predictably, did nothing. (10 RT 2215.)

The five words in that jury question speak volumes about the jury's perception of Mr. Mickel's mental state. At least one juror harbored some doubt as to whether Mr. Mickel was in his right mind during the offense. However, given the lack of instructions on lesser offenses, the jury had absolutely no basis upon which to return a verdict of less than first-degree murder. In such a case, appellant "has met his burden of establishing that a different result is probable on retrial of the case if he has established that it is probable that at least one juror would have voted to find him not guilty had the new evidence been presented." (*People v. Soojian* (2010) 190 Cal.App.4th 491,

501, 521 [sufficient showing of prejudice under *People v. Watson*]. See also *People v. Brown* (1988) 46 Cal 3d 432, 471 n.1 [Broussard, J., concurring]; *Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1054; *People v. Bowers* (2001) 87 Cal App 4th 722, 734-735.)

Showing a "reasonable probability" that at least one juror would have reached a different verdict establishes prejudice under the far more forgiving standard of *People v. Watson*. But that is far more than appellant need show here. For, if the error is not structural, the test of prejudice requires the People to show that the error was harmless beyond a reasonable doubt. In light of the fact that, in the absence of the error, the jury would have been instructed on second-degree murder, and would have had a basis to return such a verdict, the People cannot meet that burden. The conviction must therefore be reversed.

ERRORS RELATED TO THE PENALTY PHASE

IX. BECAUSE THE CALIFORNIA CAPITAL SENTENCING SCHEME IS UNCONSTITUTIONAL IN NUMEROUS RESPECTS, MR. MICKEL'S DEATH SENTENCE MUST BE REVERSED.

In the capital case of *People v. Schmeck* (2005) 37 Cal.3d 240, the defendant presented a number of attacks on the California capital sentencing scheme which had been raised and rejected in prior cases. As this court recognized, a major purpose in presenting such arguments is to preserve them for further review. (*Id.* at p. 303.) This court acknowledged that in dealing with these systemic attacks in past cases, it had given conflicting signals on the detail needed in order for a defendant to preserve these attacks for subsequent review. (*Id.* at p. 303, n.22.) In order to avoid detailed briefing on such claims in future cases, the court held that a defendant could preserve these claims by "(I) identify[ing] the claim in the context of the facts, (ii) not[ing] that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask[ing] us to reconsider that decision." (*Id.* at p. 304.)

Accordingly, pursuant to *Schmeck*, Mr. Mickel identifies the following systemic (and previously rejected) claims relating to the California death penalty scheme which require a new penalty phase in his case:

(1) The trial judge's instructions permitted the jury to rely on defendant's age in deciding if he would live or die. (25 CT 5750.) This aggravating factor was unconstitutionally vague in violation of the Eighth

Amendment and requires a new penalty phase. This court has previously rejected this argument. (*People v. Ray* (1996) 13 Cal.4th 313, 358.) The Court's decision in *Ray* should be reconsidered.

(2) California's capital punishment scheme, as construed by this Court in *People v. Bacigalupo* (1993) 6 Cal.4th 457, 475-477, and as applied, violates the Eighth Amendment and fails to provide a meaningful and principled way to distinguish the few defendants who are sentenced to death from the vast majority who are not. This court has previously rejected this argument. (*People v. Schmeck, supra,* 37 Cal.4th at p. 304.) For the same reasons set forth by appellant in *People v. Schmeck, supra*, however, the court's decision should be reconsidered.

(3) Penal Code section 190.3, subdivision (a) -- which permits a jury to sentence a defendant to death based on the "circumstances of the crime" -- is being applied in a manner that institutionalizes the arbitrary and capricious imposition of death. The jury in this case was instructed in accord with this provision. (25 CT 5749.) This court has previously rejected this argument. (*People v. Schmeck, supra,* 37 Cal.4th at pp. 304-305.) For the same reasons set forth by appellant in *People v. Schmeck, supra*, however, the court's decision should be reconsidered.

(4) Under California law, a defendant convicted of first degree murder cannot receive a death sentence unless a jury (1) finds true one or more special circumstance allegations which render the defendant death eligible and

(2) finds that aggravating circumstances outweigh mitigating circumstances. The jury in this case was not told that the second of these decisions had to be made beyond a reasonable doubt. This violated Mr. Mickel's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. This court has already rejected this argument. (*People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.) For the same reasons set forth by the appellant in *People v. Schmeck*, *supra*, however, the court's decision should be reconsidered.

(5) At the penalty phase, the trial court instructed the jury in accord with standard instruction CALJIC 8.85. (13 CT 3564.) This instruction was constitutionally flawed in five ways: (1) it failed to delete inapplicable sentencing factors, (2) it failed to delineate between aggravating and mitigating factors, (3) it contained vague and ill-defined factors, (4) some mitigating factors were limited by adjectives such as "extreme" or "substantial," and (5) it failed to specify a burden of proof as to either mitigation or aggravation. These errors, taken singly or in combination, violated Mr. Mickel's Fifth, Sixth, Eighth and Fourteenth Amendment rights. This court has already rejected these arguments. (*People v. Schmeck*, *supra*, 37 Cal.4th at pp. 304-305; *People v. Ray*, *supra*, 13 Cal.4th at pp. 358-359.) The court's decisions in *Schmeck* and *Ray* should be reconsidered.

(6) The instructions failed to inform the jurors that even if they determined that the evidence in aggravation outweighed the evidence in mitigation, the jury could still return a verdict of life without parole. Pursuant to CALJIC No. 8.88, the jury was directed that a death judgment cannot be

returned unless the jury unanimously finds that the aggravating circumstances are so substantial in comparison to the mitigating circumstances that it warrants death instead of life without parole. (10 RT 2296.) Although this finding is a prerequisite for a death sentence, it does not preclude a sentence of life without possibility of parole. (*People v. Brown* (1985) 40 Cal.3d 512, 541.)
Indeed, a jury may return a sentence of life without parole even in the complete absence of mitigation. (*People v. Duncan* (1991) 53 Ca l .3d 955, 979; CALCRIM No. 766 ["Even without mitigating circumstances, you may decide that the aggravating circumstances are not substantial enough to warrant death."] The pattern instructions given in this case, however, failed to inform the jury of this option and thereby arbitrarily deprived appellant of a state-created liberty and life interest in violation of the due process clause of the Fourteenth Amendment. (*Hicks v . Oklahoma* (1980) 447 U.S. 343, 346). This court has repeatedly rejected this claim. (See *People v. Smith* (2005) 35 Cal .4th 334, 370; People v. Arias, *supra*, 13 Cal.4th at p. 170.) Appellant urges the Court to reconsider these rulings.

(7) The California death penalty scheme violates the Equal Protection Clause. because it provides significantly fewer procedural protections fro persons facing a death sentence than those facing non-capital felonies. (See *Eddings v . Oklahoma* (1982) 455 U.S. 104, 117-118 (conc. opn. of O'Connor, J.); *Griffin v. Illinois* (1956) 351 U.S. 12, 28-29.) 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 Ca l .4th 316, 325; California Rules of Court, rule 4.42, subds . (b) , (e).) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravtating circumstances apply nor provide written findings to justify the sentence. Yet, to the extent that there may be differences between capital and non-capital defendants, those differences justify more, not fewer, procedural protections. for capital defendants. This court has previously rejected this equal protection claim. *(People v. Manriquez* (2005) 37 Cal.4th 547, 590). It should be reconsidered.

(8) Because the California death penalty scheme violates international law -- including the International Covenant of Civil and Political Rights -- Mr. Mickel's death sentence must be reversed. This court has already rejected this argument. (*People v. Schmeck*, *supra*, 37 Cal.4th at p. 305.) For the same reasons set forth by the appellant in *People v. Schmeck*, *supra*, however, the court's decision should be reconsidered.

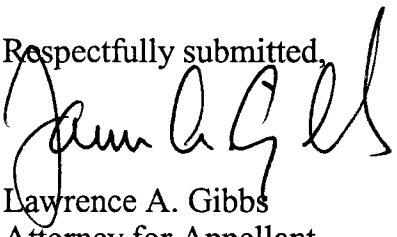
To the extent respondent argues that any of these issues is not properly preserved because Mr. Mickel has not presented them in sufficient detail to this Court, Mr. Mickel will seek leave to file a supplemental brief more fully discussing these issues.

CONCLUSION

The judgment should be reversed.

Dated: September 6, 2011

Respectfully submitted,



Lawrence A. Gibbs
Attorney for Appellant

APPENDIX

Trial Court's Colloquy With Appellant Regarding His *Faretta* Waiver
[2 RT 246-249]

THE COURT: Mr. Mickel, did you read and understand this form?

THE DEFENDANT: I did, Your Honor.

THE COURT: Do you have any questions about that form?

THE DEFENDANT: No, Your Honor.

THE COURT: Okay. Why don't you go ahead and be seated, sir. That's fine. Sir, you have a constitutional right to represent yourself subject to the Court's approval. Some of this that I am going to talk to you about is already on the form, but I just want to talk to you and converse a little bit so I can be sure that you understand at least some of the ramifications of representing yourself and some of the rights that you may be giving up. You do understand that you have a right to be represented by counsel, do you not?

THE DEFENDANT: Yes, I do.

THE COURT: Do you understand that you have a right to Court-appointed counsel such as you have had in the past, and that would continue unless it is changed by the Court?

THE DEFENDANT: Yes, I do.

THE COURT: Generally speaking, it is unwise for someone to represent themselves for a variety of reasons. Do you understand that?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: Probably the first obvious one would be that the People are going to be represented by attorney who undoubtedly is going to have years of experience at trying cases. I always try to think of a good example to use to perhaps make my point, and the best maybe I can do is that, I don't know if you are familiar with the U.S. Open golf tournament. But you have amateurs and you have pros, and some of those amateurs are very good golfers. They know the game. They know how to play golf. They are very skilled at it. And they always lose to the professionals because, as good as they may be as amateurs, they are not as good as the professionals. There is at least some

truth to that in a courtroom. No matter how good you are as an amateur, no matter how much you have studied, no matter how prepared you are, you are going to be at certain disadvantages just because you haven't made your living in a courtroom, and there are going to be attorneys opposing you that are going to be more skilled than you are. Do you understand that disadvantage?

THE DEFENDANT: I understand that disadvantage, Your Honor.

THE COURT: Okay. Do you understand that the Court cannot assist you? The Court may or may not appoint advisory counsel for you. But once you choose to represent yourself, you are essentially on your own. You will expected to conduct yourself essentially as an attorney would be required to conduct himself. And the Court cannot come to your assistance at any time during the trial. Do you understand that?

THE DEFENDANT: I do, Your Honor.

THE COURT: Do you understand that if there are any difficulties in your behavior in the courtroom or the way that you are, if you are conducting yourself inappropriately, that the Court can terminate your ability to represent yourself?

THE DEFENDANT: I understand that, Your Honor.

THE COURT: Do you understand that that can be at a big disadvantage to you, because even if the Court has counsel standing by, you are the one that has been conducting yourself, and it would interrupt the flow of your case. Nevertheless, you are stuck with that decision. Understand that?

THE DEFENDANT: Understand that.

THE COURT: Do you understand that -- well, I will put it a little different way. Normally a defendant who is represented by an attorney, if they lose, if they are convicted and they go to appeal the case, they can at least make an argument that their attorney did not conduct their case competently.
If you choose to represent yourself, no matter how bad you may do, you cannot claim incompetency of counsel because you choose to represent yourself. Understand that?

THE DEFENDANT: I know that, Your Honor.

THE COURT: Sir, do you have any questions about your ability to represent yourself in the proceeding?

THE DEFENDANT: No, Your Honor.

THE COURT: Mr. McCrae -- or Mr. Mickel and Mr. Reichle and Mr. Cohen, the Court has read and considered the motions and points and authorities submitted by all parties, and that includes the Defendant.

[*The parties then addressed the Court regarding the role of advisory counsel.*]

THE COURT: Sir, let me make sure that I am clear in my own mind. You have made a request to represent yourself. The Court may allow Mr. Reichle to act as an advisor to you. One thing that gave me a moment of pause is that you want him to handle things that you can't handle, or some words to that effect. If you represent yourself, you will be responsible for representing your case in court, whether you can handle it or not. The best that Mr. Reichle may give to you is some limited assistance. But the case will be your responsibility, for better or worse. Do you understand that?

THE DEFENDANT: So you are saying that he will not -- Mr. Reichle will never be available to examine witnesses or to interact with the Court, Your Honor?

THE COURT: I am telling you at this point that the Court isn't prepared to answer that question. What the Court is prepared to do is to permit you to represent yourself. What the Court is prepared to do is to allow Mr. Reichle to be an advisor for you. But an doesn't participate in the court process. An advisor may be with you in court; may be available to answer questions for you. But when it comes to presenting your case, that will be your responsibility because you are representing yourself. The Court may at some point in time be open to allowing Mr. Reichle to handle certain aspects of the case, but you should not assume that at this point. If you are taking on the responsibility of self-representation, you are taking on all of it, and must assume that you are going to have to handle that case on your own.

THE DEFENDANT: Right.

THE COURT: Understood?

THE DEFENDANT: I agree with Your Honor, and I understand that.

THE COURT: And is that the responsibility that you want to take on?

THE DEFENDANT: That's correct, Your Honor.

THE COURT: Okay. Anything further, sir?

THE DEFENDANT: No, Your Honor.

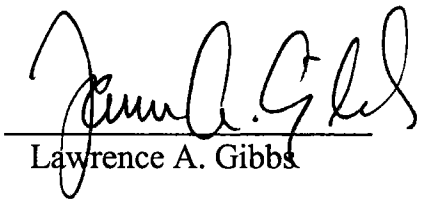
THE COURT: The Court at this time recognizes the Defendant's right under *Faretta* to represent himself. Whether or not the Court believes that is a wise or an appropriate decision, it appears to the Court that the Defendant's waiver to right of counsel is knowing, intelligent, express and explicit, and that therefore is entitled to make that decision. The Court will at this time permit the Defendant to represent himself.

— End of Transcript Excerpt —

CERTIFICATE PER CAL. RULES OF COURT, RULE 8.204(c)

I certify that this petition is produced in 13-point proportional type and contains 54,741 words.

Date: September 6, 2011



Lawrence A. Gibbs

PROOF OF SERVICE

I declare that I am employed in the County of Alameda. I am over the age of eighteen years and not a party to this cause. My business address is P.O. Box 7639, Berkeley, California. Today, I served the foregoing **Appellant's Opening Brief**, on all parties in this cause by placing a true copy thereof enclosed in a sealed envelope with postage fully prepaid, in the United States mail at Berkeley, CA, addressed as follows:

Office of Attorney General
1300 I St., #1100
P.O. Box 944255
Sacramento, CA 94244-2550

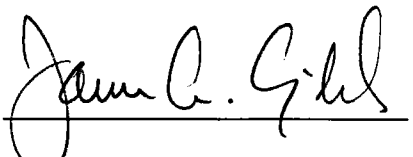
Gregg Cohen
Tehama County District Attorney
444 Oak Street, Room L
Red Bluff, CA 96080

Tehama County Superior Court
445 Pine St.
P.O. Box 1170
Red Bluff, CA 96080

Andrew Mickel V-77400
San Quentin State Prison
San Quentin, CA 94974

Scott Kauffman
CAP
101 Second St., #600
San Francisco, CA 94105

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 7, 2011 in Berkeley, California.



Lawrence A. Gibbs