No. S179181

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
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PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. MICHAEL RAY BURGENER, Defendant and Appellant.	(Riverside County Superior Court No. CR 18088)

APPELLANT'S OPENING BRIEF

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

HONORABLE CRAIG G. RIEMER, JUDGE

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. MICHAEL RAY BURGENER, Defendant and Appellant.	No. S179181 (Riverside County Super. Ct. No. CR 18088)

APPELLANT'S OPENING BRIEF

STATEMENT OF THE CASE

In 1981, appellant Michael Ray Burgener was convicted of one count of murder under Penal Code section 187[1] with use of a firearm (§ 12022.5), one count of robbery (§ 211) with use of a firearm (§ 12022.5) and infliction of great bodily injury (§ 12022.7), and one count of being an ex-felon in possession of a firearm (§ 12021). The jury fixed the degree of murder at first degree, found that it was committed during a robbery, and that the murder was committed with express malice aforethought and with deliberation and premeditation. Under the 1978 death penalty law, a robbery-murder special circumstance (§ 190.2, subd. (a)(17)(i)) was found

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

true, and appellant was sentenced to death. On March 27, 1986, this Court affirmed the guilt judgment in its entirety, but reversed the penalty judgment. (*People v. Burgener* (1986) 41 Cal.3d 505, 511-512 ("*Burgener I*".)

On penalty retrial, the jury returned a verdict of death. Appellant's motion to modify the verdict from death to life imprisonment without possibility of parole pursuant to section 190.4, subdivision (e), was granted by Judge William Mortland, and the People appealed. On appeal, the court of appeal reversed and remanded with directions that Judge Mortland reconsider and rule on the motion to modify the penalty verdict in accordance with the views expressed in its opinion. (*People v. Burgener* (1990) 223 Cal.App.3d 427, 435-436 ("*Burgener II*").)

Because Judge Mortland was unavailable, the case was reassigned to Judge Ronald R. Heumann, who denied the application to modify the penalty verdict. Appellant was again sentenced to death, whereupon his automatic appeal followed.

On April 9, 2003, this Court found no error in the penalty phase retrial. However, it found that Judge Heumann had committed reversible error in ruling on the section 190.4, subdivision (e), application for modification and vacated the judgment of death solely to permit Judge Heumann to reconsider the automatic application to modify the verdict under the correct legal standard. (*People v. Burgener* (2003) 29 Cal.4th 833, 893 ("*Burgener III*").)

Following this Court's remand, Judge Heumann granted appellant's motion for self-representation under *Faretta v. Califonia* (1975) 422 U.S. 806 ("*Faretta*"). On November 7, 2003, Judge Heumann again denied appellant's section 190.4, subdivision (e), application, and sentenced

appellant to death. Appellant's automatic appeal followed. On May 7, 2009, this Court found that Judge Heumann committed reversible *Faretta* error. (*People v. Burgener* (2009) 46 Cal.4th 231, 243-245 ("*Burgener IV*").) The judgment of death was vacated, and the matter remanded "for reconsideration of defendant's request to represent himself (unless defendant withdraws his request in the interim) and the automatic application for modification of the death verdict." (*Id.* at p. 245.) Noting that Judge Heumann had passed away, the remand order also specified that the matter was to be heard by another judge of the same court.

Following this latest remand, on July 30, 2009, appellant's case was assigned to Judge Craig G. Riemer for all purposes and, over appellant's objection, a hearing date for August 28, 2009, was set. (1 CT 31; 1 RT 12-14.)[2] On August 28, 2009, Judge Riemer heard and granted appellant's oral motion for self-representation under *Faretta*. (1 CT 32-33; 1 RT 15-22.) On December 11, 2009, Judge Riemer denied appellant's section 190.4, subdivision (e), application, and sentenced appellant to death. (1 CT 83-92; 1 RT 41-46.)

STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death. (§ 1239, subd. (b).) The appeal is taken from a judgment which disposes of all issues between the parties. By this Court's opinion of May 7, 2009, this appeal "shall be limited to issues related to the modification application." (*Burgener IV*, *supra*, 46 Cal.4th at p. 246.)

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[2] "CT" refers to the clerk's transcript and "RT" refers to the reporter's transcript.

STATEMENT OF FACTS

A. Introduction

In 1988, following the retrial of the penalty phase of this capital case, a jury returned a death verdict against appellant. In the following 23 years, three different trial judges have reweighed the evidence a total of four times in order to determine whether, in their independent judgment, the evidence supported the jurors' death verdict.[3] (See § 190.4, subd. (e).) The first two such judges – Judges Mortland and Heumann – arrived at different conclusions, and each jurist's decision was reversed on appeal for misapplication of the statute imposing a duty on the trial judge to independently review the evidence considered by the jury in a capital case. This appeal now comes before this Court as the latest chapter in the history of the trial court's attempts to properly exercise its statutory duty, a history this Court has aptly described as "long and unhappy." (*Burgener IV*, *supra*, 46 Cal.4th at p. 235.) Because the issues raised in this appeal are in large part procedural, a detailed recital of the underlying facts developed at the penalty phase retrial in 1988 is unnecessary. (*People v. Avila* (1994) 24 Cal.App.4th 1455, 1457.) As such, the summary of facts set forth in this Court's 2009 opinion, describing the evidence produced at the 1988 penalty retrial, is sufficient:

> The facts of the crime are set out in our prior opinion. [] For purposes of this appeal, it is sufficient to note that defendant shot and killed William Arias, a clerk at a 7–Eleven in Riverside, with five shots from a .22–caliber weapon at close range and emptied the store's cash register of approximately $50. At the penalty retrial, the People presented evidence that, in 1969, defendant had attempted to rob and kill a clerk

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[3] Judge Heumann ruled on the modification motion twice.

> at a liquor store located a block and a half away from the 7–Eleven where Arias was murdered. In 1977, just over two months after being released from prison, defendant robbed a pawnshop clerk.[] The People also presented evidence of defendant's violent conduct against correctional officers and fellow inmates. Defendant presented evidence that he did not kill Arias, that he had not even been present at the scene, and that he had been framed by two of the prosecution witnesses. The defense also offered evidence that he had been abused as a child and suffered from adjustment and personality disorders.

(*Burgener IV*, *supra*, 46 Cal.4th at pp. 234-235, citation and footnote omitted.)

B. The Various Hearings On Appellant's Motion To Modify The Verdict

1. Preliminary Proceedings

Following this Court's latest order, remanding the matter to the superior court for reconsideration of appellant's motions for self-representation and to modify the jury's death verdict, appellant first appeared with counsel in the superior court on July 24, 2009. (1 CT 29; 1 RT 9-11.) On July 30, 2009, the presiding judge assigned the matter to Judge Riemer for all purposes, calendaring the first hearing for August 28, 2009. Counsel for appellant objected to such a lengthy delay, noting that appellant wished to represent himself and have the proceedings move along as quickly as possible. The presiding judge overruled counsel's objection, noting that it needed to proceed with care because this was a capital case, and found good cause to continue the proceedings. (1 RT 12-14.)

2. Appellant's Request for Self-Representation

On August 28, 2009, appellant, represented by Riverside County Deputy Public Defender Michael Kersse, appeared before Judge Riemer. (1 RT 15.) Appellant informed the trial court that he wished to represent

himself at the hearing on the section 190.4, subdivision (e), automatic motion for modification of the jury's death verdict. (1 RT 16.) Judge Riemer engaged appellant in a colloquy in order to satisfy himself that appellant understood the perils and pitfalls of self-representation. (1 RT 16-21.) Based upon appellant's responses, Judge Riemer observed that appellant was aware of the dangers of self-representation, appeared competent to make the decision to represent himself, and therefore the trial court was prepared to grant his request notwithstanding its advice to appellant to proceed with counsel. (1 RT 21.) Judge Riemer solicited and received input from Kersse as well as the prosecutor, and ultimately found that appellant's decision to represent himself was knowing and voluntary, with a full understanding of the risks and consequences. He thereupon granted appellant's request and relieved Kersse of any further obligation to represent appellant. (1 RT 21-22, 29.)

3. Judge Riemer's Denial Of The Automatic Motion To Modify The Jury Verdict

At a hearing on November 6, 2009, Judge Riemer issued an order for additional briefing. (1 CT 57-61.) By way of explanation, he observed that to ensure that the ruling in this matter not be reversed a fifth time, he wished the parties to consider a number of questions.[4] The prosecutor was

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[4] Judge Riemer was concerned with (1) the scope of his authority in ruling on the section 190.4, subdivision (e), motion in light of language describing the trial court's task in *Burgener III*, *supra*, 29 Cal.4th at page 891; (2) whether there was a presumption that the jury's verdict was consistent or contrary to the law and evidence; (3) which standard of proof he was to employ in conducting his independent evaluation of the evidence; (4) whether he was bound by factual findings made in rulings on previous section 190.4, subdivision (e), applications; (5) how to correctly apply

(continued...)

ordered to file a supplemental brief, and appellant was invited to do so. (1 RT 35-40.) Only the prosecutor filed a written response, on November 25, 2009. (1 CT 65-78.)

At the December 11, 2009, hearing, Judge Riemer provided the parties with a written tentative ruling on the section 190.4, subdivision (e), motion and invited argument. (1 RT 41-46, 1 CT 85-92.) Appellant declined further comment, and the prosecutor noted his agreement with the intended ruling. (1 RT 41.) Adopting his tentative ruling, Judge Riemer denied the motion. (1 RT 42-44.)

In his ruling denying the section 190.4, subdivion (e), motion, Judge Riemer described the portions of the record and the written arguments of the parties he had considered, as well as those he had rejected as irrelevant. (1 CT 86.) He then summarized the task before him as follows:

> In short, the Court's job when confronted with a 190.4(e) application is to independently determine the credibility and probative value of the evidence, but not to independently decide what the penalty should be. Instead, the Court decides only whether the evidence, weighed in accordance with the Court's own evaluation of its strength, supports the jury's verdict as to the penalty. If so, the application to modify the verdict must be denied, even if equally credible evidence also supports a different conclusion favored by the Court.

(1 CT 87.) Because he had not presided at the penalty retrial, he found that "necessity requires the replacement judge to evaluate the credibility of the witnesses as best he or she can from the written record." (1 CT 88, quoting

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[4] (...continued)
"lingering doubt" as a mitigating factor; and (6) how he should approach credibility evaluations of the witnesses when he had not presided over the penalty retrial. (1 CT 58-61.)

from *People v. Lewis* (2004) 33 Cal.4th 214, 226.) However, he declined to be bound by, or even consider, factual findings made at a relevant prior section 190.4, subdivision (e), application, reasoning that any attempt to do so would be inconsistent with his duty to conduct an independent review. (1 CT 88.)

Turning to the evaluation of the statutory aggravating factors, Judge Riemer found the circumstances of the crime (§ 190.3, factor (a)) – the "utterly unjustified" murder of a store clerk during a robbery – strongly aggravating. He found aggravating, on balance, the presence or absence of criminal activity by appellant which involved force or violence (§ 190.3, factor (b)), noting an undisputed long history of violent activity from 1969 to 1977 during periods when appellant was not incarcerated, as well as violent behavior directed at correctional officers and inmates when appellant was incarcerated at San Quentin from 1973 to 1975. On the other hand, Judge Riemer deemed credible the evidence that an extraordinarily hostile relationship between correctional staff and inmates in San Quentin existed at this time, and that appellant may have felt the necessity to protect himself from violence emanating from other inmates or correctional officers. Judge Riemer found appellant's two prior felony convictions (§ 190.3, factor (c)) strongly aggravating, noting that appellant had served prison terms after each such conviction and had re-offended within months of his release from prison. (1 CT 88-89.)

As for the statutory mitigating factors, Judge Riemer found "somewhat mitigating" that the offense was committed while appellant was under the influence of extreme mental or emotional disturbance (§ 190.3, factor (d)). In that regard, Judge Riemer found credible the psychiatric evidence that appellant had been diagnosed with psychiatric problems at an

early age, but had never received adequate treatment despite recommendations for such treatment. However, it did not appear to Judge Riemer that appellant's mental or emotional problems were extreme, and he found "too speculative" the defense psychiatrist's opinion that appellant's psychological condition was a significant cause of his criminal behavior, or that he had committed the capital homicide in order to "punish himself." Likewise, Judge Riemer found somewhat mitigating that appellant's capacity to conform his conduct to the law was impaired (§ 190.3, factor (h)), noting there was credible evidence that appellant's psychological condition impaired his capacity to conform his conduct to the law. As for the remaining statutory mitigating factors, Judge Riemer found there was no evidence to suggest that the victim had participated in, or consented to, the homicide (§ 190.3, factor (e)), that appellant reasonably believed his conduct was morally justified or extenuated (§ 190.3, factor (f)), that he acted under extreme duress (§ 190.3, factor (g)), that he was anything other than the sole principal in the commission of the homicide (§ 190.3, factor (j)), or that any other circumstance existed which extenuated the gravity of the crime (§ 190.3, factor (k)). Consequently, these factors were not deemed to be mitigating in appellant's case, nor was appellant's age deemed mitigating (§ 190.3, factor (i)). (1 CT 90-91.)

Finally, Judge Riemer addressed three additional factors he considered as falling outside the statutory scheme. The first of these factors was lingering doubt as to appellant's guilt. In his review of the defense case for lingering doubt at the penalty retrial, Judge Riemer gave credence to evidence that demonstrated (a) that the significance of forensic testing of appellant's shoes for blood linking him to the crime "was greatly overstated," and (b) that appellant's girlfriend, Nora England, was not a

credible witness against him. On the other hand, Judge Riemer found that the weight of the evidence did not support the defense's position that Joseph deYoung, an informant and the prosecution's other star witness, "had the motive and opportunity to, and did in fact, frame [appellant] for the crime." As Judge Riemer put it:

> To the contrary, the evidence of guilt, although circumstantial, is compelling. While there is a possibility that the defendant was framed, it is not a realistic possibility. The Court does not find any doubt in the defendant's guilt is strong enough to mitigate against a death penalty.

(1 CT 92.) Second, Judge Riemer reviewed the evidence that appellant had a traumatic childhood in a dysfunctional family, and found such evidence to be credible. "That fact tends to mitigate against a death sentence." (1 CT 92.) Third, Judge Riemer found that evidence of appellant's religious conversion in the months immediately before the capital crime was less than credible, and did "not significantly mitigate against a death sentence."

Ultimately, Judge Riemer found that the jury's death verdict was supported by the law and the evidence and "[a]ccordingly, the 190.4(e) application to modify the verdict must be, and is, denied." (1 CT 92.) Appellant was thereupon sentenced to death. (1 Supp CT 54-55; 1 RT 50-52.)

//

I

THE DEATH JUDGMENT MUST BE REVERSED BECAUSE JUDGE RIEMER ERRED IN ALLOWING APPELLANT TO REPRESENT HIMSELF AT THE PENAL CODE SECTION 190.4, SUBDIVISION (e), PROCEEDINGS

A. Introduction

Before granting appellant's request for self-representation, Judge Riemer conducted an extended inquiry. However, neither his order granting appellant's request nor his finding that appellant's waiver of counsel was knowing and voluntary, with full knowledge of the pitfalls of self-representation, can be reconciled with the record evidence in this case, which demonstrates that appellant's request was equivocal, and that he had not been sufficiently apprised of the dangers of self-representation. Because appellant had no constitutional or statutory right to represent himself at the section 190.4, subdivision (e), hearing, and he did not truly wish to represent himself at that hearing but instead sought to dispense with the assistance of counsel simply out of frustration, Judge Riemer erred in granting appellant's request for self-representation. (*People v. Stanley* (2006) 39 Cal.4th 913 ("*Stanley*"); *People v. Marshall* (1997) 15 Cal.4th 1 ("*Marshall*").) This error requires that appellant's death sentence be vacated yet again.

B. Proceedings Below

Once Judge Riemer was informed of appellant's request to represent himself, he commenced an inquiry into appellant's understanding of the law and the proceedings, as well as the pitfalls of self-representation. Judge Riemer learned that appellant had never studied law before, or represented himself in a criminal case other than the previous section 190.4, subdivision

(e), proceedings before Judge Heumann in 2003. (1 RT 16.) Judge Riemer then asked appellant if he understood the issues involved in the section 190.4, subdivision (e), application. When appellant replied affirmatively, the trial court asked him what those issues were. The following colloquy ensued:

> THE DEFENDANT: I'm down here for the automatic motion to modify the penalty from death to life.
>
> THE COURT: Right. But what are the legal issues that are to be decided in whether I grant that motion or whether I deny that motion? Do you understand that?
>
> THE DEFENDANT: You're to weigh the mitigating, aggravating circumstances against each other and determine whether the jury's findings were enough to give me death.
>
> THE COURT: Okay.
>
> THE DEFENDANT: Or whether you should overturn it to life without.

(1 RT 16-17.)

Judge Riemer then shifted his inquiry to appellant's understanding of the pitfalls of self-representation. Appellant was told, and acknowledged he understood, that he would be opposed by a highly experienced prosecutor and that the court could not provide him with help or assistance. When Judge Riemer asked if he understood that he would not receive any "slack" because he was representing himself, appellant replied, "I realize that whether I have the top criminal defense attorney in the world or myself, what was going to happen – what is going to happen is going to happen regardless. I realize that." Judge Riemer asked appellant to explain this remark, and appellant fatalistically replied that "the limited scope of what

you're to determine is going to be determined the same way that it's been determined all along." (1 RT 17.)

When Judge Riemer remarked that the section 190.4, subdivision (e), application had been decided differently by two other judges, appellant explained that the judge who had granted the application (Judge Mortland) was the judge who actually presided at the penalty retrial and observed the witnesses, whereas the judge who had decided the application by reviewing the transcripts (Judge Heumann) had denied the application. Thus, according to appellant, Judge Riemer would also be unable to make the determination made by Judge Mortland. (1 RT 17-18.)

After repeating and explaining the adage that a person who represents himself has a fool for a client, Judge Riemer summarized appellant's mindset: "[W]hat I hear you saying is it's not going to make any difference. I'm confident what the ruling is going to be, therefore, I prefer to represent myself." (1 RT 18.) When he then asked appellant what he believed to be the disadvantage of proceeding with experienced counsel if appellant believed the court's decision would be the same regardless of who represented him, appellant's reply was particularly revealing:

> THE DEFENDANT: The downside is the length of time that it's going to take. My case has been in the State courts for – well, you know the number of years it's been in the State court. I can't sit here before you or anybody else or let anybody – I've had no say in what's happened here throughout this case. All the lawyers I've had have always done what they wanted to do. Take the penalty phase, for instance, I can't in good conscience, try to mitigate a sentence when I'm claiming I'm innocent. How can I let an attorney do the things that they do to try to mitigate a sentence of death? *To me, a sentence of life without is worse than death, actually, to me right now where my case is in the courts.* I want to get this hearing over with, and, you know, get my

case in through the courts before I die of old age.

(1 RT 18-19, italics added.)

While expressing understanding for appellant's impatience and his sense of powerlessness in the face of counsel's decisions over the history of his case, Judge Riemer asked appellant if he understood that no ruling on the section 190.4, subdivision (e), application would be made that day, regardless of who represented him because of the necessity to review the voluminous record. Appellant replied that he understood this, but did not believe it should take the court very long to do so. (1 RT 19.) Appellant reiterated that while he understood the motion would not be decided that day, his desire to represent himself was grounded on his belief that he could accomplish just as much or as little for himself as any attorney could given the limited scope of the section 190.4, subdivision (e), hearing. (1 RT 19-20.)

Judge Riemer cautioned appellant that his decision would be irrevocable, that no attorney would be waiting in the wings to step in if he changed his mind, and that should the 190.4, subdivision (e), application be denied and appealed, appellant would not be heard to complain that he received the ineffective assistance of counsel. Appellant indicated that he understood all of this. (1 RT 20.) Judge Riemer assured appellant that he had no stake in the case, having only reviewed this Court's latest opinion in his case. Judge Riemer advised appellant to continue to accept representation by Deputy Public Defender Kersse, noting that Kersse was an excellent lawyer and that he was in "an excellent position" to see that no stone was left unturned in advocating on appellant's behalf. Furthermore, notwithstanding appellant's belief that any effort to persuade the court to grant the application was futile, there was a difference between what

appellant believed was possible and what an experience capital-case litigator like Kersse might believe. As Judge Riemer put it, "[l]ightening does strike." (1 RT 21.)

Judge Riemer then granted appellant's request for self-representation, finding that he understood the risks of foregoing the benefits of representation by counsel, and that appellant was competent to make his decision. However, Judge Riemer again advised appellant against representing himself. Appellant's response was again highly revealing:

> THE DEFENDANT: Your Honor, let me just say this. The very best that can come of this hearing that I'm down here for is that I be given life without possibility of parole. To me, that's the very worst thing that can happen, therefore, I do wish to represent myself."

(1 RT 21.)

Judge Riemer requested and received input from Kersse and the prosecutor. Kersse said that he had conversed at length with appellant regarding his position on the section 190.4, subdivision (e), application and was satisfied that appellant was aware of the legal principles involved, the scope of the hearing, and the duties and obligations of the trial court. (1 RT 21-22.) The prosecutor observed that appellant seemed "bright," "lucid," and "rather intelligent," and in no way appeared "strange" during his colloquy with the court. (1 RT 22.) Judge Riemer reaffirmed that he was granting appellant's request to represent himself, observing that appellant appeared to have thought about his decision in a careful and rational manner. Judge Riemer concluded that appellant's choice was knowing, voluntary, and with a full understanding of the risks and consequences. (1 RT 22.)

C. The Sixth Amendment Did Not Compel Judge Riemer To Grant Appellant's Request For Self-Representation

Preliminarily, it must be noted that it is by no means clear that a right to self-representation extends to a section 190.4, subdivision (e), hearing such as the one here, where appellant was initially represented by counsel at the guilt phase, penalty phase, and penalty retrial. While this Court's order in *Burgener IV*, *supra*, 46 Cal.4th at page 245, remanding the matter to the superior court for "reconsideration of defendant's request to represent himself" could be read as an implied recognition of appellant's right to self-representation at such a hearing, the reasoning of the United States Supreme Court in *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.* (2000) 528 U.S. 152 ("*Martinez*") casts substantial doubt on that proposition.

In *Martinez*, the high court explained that "[o]ur conclusion in *Faretta* extended only to a defendant's 'constitutional right to conduct his own defense.' *Id.*, at 836, 95 S.Ct. 2525. Accordingly, our specific holding was confined to the right to defend oneself at trial." (*Martinez*, *supra*, 528 U.S. at p. 154.) More specifically, the high court stated that "[t]he Sixth Amendment identifies the basic rights that the accused shall enjoy in 'all criminal prosecutions.' They are presented strictly as rights that are available *in preparation for trial and at the trial itself*." (*Id.* at pp. 159-160, italics added.) In this regard, the *Martinez* court was not writing on a clean slate. "[T]he defendant's right to proceed pro se exists in the larger context of the criminal trial designed to determine whether or not a defendant is *guilty* of the offense with which he is charged." (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 177-178, fn. 8, italics added.) Even within that context, the right of self-representation is not absolute. "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." (*Martinez*, *supra*, 528 U.S. at p. 162.) "The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law." (*Faretta*, *supra*, 422 U.S. at p. 834, fn. 46)

Accordingly, this Court in *In re Barnett* (2003) 31 Cal.4th 466 explained that *Martinez* placed a limit on the right of self-representation following conviction:

> As the United States Supreme Court recently explained, the sole constitutional right to self-representation derives from the Sixth Amendment, which pertains strictly to the basic rights that an accused enjoys in defending against a criminal prosecution and does not extend beyond the point of conviction. (*Martinez*, *supra*, 528 U.S. at pp. 154, 160–161, 120 S.Ct. 684.) Emphasizing that the change in one's position from "defendant" to "appellant" is a significant one, the high court found that the balance between a criminal defendant's interest in acting as his or her own lawyer and a state's interest in ensuring the fair and efficient administration of justice "surely tips in favor of the [s]tate" once the defendant is no longer presumed innocent but found guilty beyond a reasonable doubt. (*Id.* at p. 162, 120 S.Ct. 684.)

(*In re Barnett*, *supra*, 31 Cal.4th at p. 473.)

Here, it is clear that appellant's guilt for the capital crime was adjudicated long ago, at a trial in which he was represented by counsel and in which the guilt judgment was affirmed by this Court in *Burgener I*, *supra*, 41 Cal.3d 505, more than a quarter century before he requested self-representation in the present case. Even the penalty retrial following this Court's decision in *Burgener I*, at which appellant was also represented by counsel, took place in the distant past and the trial court's denial of appellant's motion for a new penalty trial in 1991 was affirmed by this

Court nine years ago in *Burgener III, supra*, 29 Cal.4th at page 893.

Thus, when appellant most recently appeared before Judge Riemer for the section 190.4, subdivision (e), proceedings, his position was that of a person convicted long ago, and more akin to an "appellant" within the meaning of *Martinez* than that of a defendant facing any kind of trial at which he could present a defense. At such a proceeding, which is "automatic" and not triggered by the defendant's choice, and where the trial court's findings serve the significant function of safeguarding careful appellate review in capital cases (see, e.g., *People v. Diaz* (1992) 3 Cal.4th 495, 571, 575 & fn. 34; *People v. Frierson* (1979) 25 Cal.3d 142, 179), as well as acting as one of the key "checks on arbitrariness" in California's death penalty scheme (see *Pulley v. Harris* (1984) 465 U.S. 37, 51-53 [citing the role of § 190.4, subdivision (e), in ensuring that California's statutory death penalty scheme complies with the Eighth and Fourteenth Amendment]; *Gregg v. Georgia* (1976) 428 U.S. 153, 195; *Proffitt v. Florida* (1976) 428 U.S. 242, 259-260), the state's strong interest in the accuracy and fairness of its criminal proceedings is at its apex. (*Sell v. United States* (2003) 539 U.S. 166, 180; *Massie v. Sumner* (9th Cir. 1980) 624 F.2d 72, 74; *People v. Chadd* (1981) 28 Cal.3d 739, 751-55.) As such, the Sixth Amendment did not compel, much less permit, Judge Riemer to grant appellant's *Faretta* motion. (*Martinez, supra*, 528 U.S. at p. 154; *In re Barnett, supra*, 31 Cal.4th at p. 473; cf. *People v. Bloom* (1989) 48 Cal.3d 1194, 1219-1220 [finding a discretionary non-constitutional basis for the grant of a midtrial request for self-representation compatible with *Faretta* notwithstanding defendant's express intent to utilize self-representation in seeking the death penalty].)

This Court has recently held that a criminal defendant has no

constitutional or statutory right to self-representation under California law. (*People v. Johnson* (2012) 53 Cal.4th 519, 526.) Thus, California retains the right to refuse self-representation in every situation where it is not absolutely demanded by *Faretta*. Accordingly, the *Johnson* court counseled that "California courts should give effect to this California law when it can." (*People v. Johnson*, *supra*, 53 Cal.4th 519 at p. 526.) Here, it can and should do so by finding that Judge Riemer erred by granting appellant's request for self-representation.

To the extent that Judge Riemer possessed any discretion to allow appellant to represent himself, that discretion was abused on this record. (Cf. *People v. Bloom*, *supra*, 48 Cal.3d at pp. 1219-1220; *People v. Hamilton* (1988) 45 Cal.3d 351, 369; *People v. Windham* (1977) 19 Cal.3d 121, 129.) Clearly, Judge Riemer thought that appellant's choice was a foolish one, especially as appellant made it clear he had no intention of "defending" himself. (See, e.g., *People v. Clark* (1992) 3 Cal.4th 41, 113-116 [upholding trial court's decision to revoke defendant's *Faretta* status when he announced his intention, mid-trial, to stand mute, reasoning that it was obliged "to interpret *Faretta* in a reasonable fashion"].)

Ironically, when Judge Riemer repeated his desire to decide the section 190.4, subdivision (e), application correctly, and to thereby avoid the multiplicity of reversible errors committed in previous proceedings, he did so while persuading appellant to consent to a continuance in order that the court receive legal guidance only from *the People* "with their considerable resources." (1 RT 35.) "[T]he right of self-representation is not a license to subvert the very adversary process of which it is but one part." (*People v. Bloom*, *supra*, 48 Cal.3d at p. 1240 (dis. opn. of Mosk, J.).) Judge Riemer was made explicitly aware that appellant wished the

proceedings before the court to end with his death sentence intact; he expressly informed Judge Riemer twice that the very worst thing that could happen to him was to receive a sentence of life imprisonment without possibility of parole. As this Court noted in *People v. Chadd*, *supra*, 28 Cal.3d 739, "'the waiver concept was never intended as a means of allowing a criminal defendant to choose his own sentence. *Especially is this so where, as here, to do so would result in state aided suicide.*'" (*People v. Chadd*, *supra*, 28 Cal.3d at p. 753 & fn. 9, quoting *Commonwealth v. McKenna* (Pa. 1978) 383 A.2d 174, 181 (italics in original).) Judge Riemer was not compelled to grant appellant's request under the Sixth Amendment, and his decision to do so cannot be upheld as a proper exercise of any discretion.

This is not a case like *People v. Bloom*, *supra*, 48 Cal.3d 1194, where this Court concluded that the trial court had not abused its discretion in granting a defendant's request for self-representation made midtrial between the guilt and penalty phases, even though the defendant sought self-representation in order to obtain a death sentence. Unlike *Bloom*, appellant had no "strategy" to present at trial to a jury to ensure a death verdict. Moreover, Judge Riemer lacked authority to decide appellant's punishment according to his predilections so as to thwart such a "strategy" directed at him. (*People v. Frierson*, *supra*, 25 Cal.3d 142, 193, fn. 7 (conc. opn. of Mosk, J.).) More significantly, and unlike *Bloom*, it is the trial court's job – not the jury's – to independently evaluate the death penalty verdict to ensure that it comports with constitutional standards.

The United States Supreme Court has frequently stated that the Eighth Amendment and evolving standards of societal decency impose a high requirement of reliability on the determination that death is the

appropriate penalty in a particular case. (*Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233, 246; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584; *Mills v. Maryland* (1988) 486 U.S. 367, 377; *Hitchcock v. Dugger* (1987) 481 U.S. 393; *Furman v. Georgia* (1972) 408 U.S. 238.) Self-representation at a proceeding whose purpose is to ensure such reliability is incompatible with the Eighth Amendment. The section 190.4, subdivision (e), hearing is such a proceeding. (*Pulley v. Harris*, *supra*, 465 U.S. at pp. 51-53; see also *People v. Rodriguez* (1986) 42 Cal.3d 730, 793-794 [automatic review of a death verdict under section 190.4, subdivision (e), must be construed as requiring independent review to preclude finding of federal unconstitutionality]; accord *People v. Allison* (1989) 48 Cal.3d 879, 913-916.) In this regard, the section 190.4, subdivision (e), proceedings serve the same purposes as the automatic appeal following a death judgment, which cannot be waived and where self-representation is not permitted. (*People v. Stanworth* (1969) 71 Cal.2d 820; *People v. Massie* (1998) 19 Cal.4th 550). California has an independent interest in the accuracy of penalty determinations in capital cases (*People v. Teron* (1979) 23 Cal.3d 103, 115 & fn. 7), an interest that cannot be contravened by private agreement (*People v. Stanworth*, *supra*, 71 Cal.2d at p. 834), where its death penalty scheme requires the assistance of counsel at every stage of a capital trial. (*People v. Taylor* (2009) 47 Cal.4th 850, 872 & fn. 9; Pen. Code, § 686.1.)

D. The Record Demonstrates That Appellant's Request For Self-Representation Was Equivocal And Made Out Of Frustration And Resignation

Even if appellant had a Sixth Amendment right to represent himself at the section 190.4, subdivision (e), hearing, Judge Riemer erred in finding that his invocation of that right was unequivocal. In *Marshall*, *supra*, 15

Cal.4th 1, this Court noted the tension between a criminal defendant's constitutional right to counsel and the right of self-representation; both guaranteed by the Sixth Amendment:

> A defendant in a criminal case possesses two constitutional rights with respect to representation that are mutually exclusive. A defendant has the right to be represented by counsel at all critical stages of a criminal prosecution. [Citations.] At the same time, the United States Supreme Court has held that because the Sixth Amendment grants to the accused personally the right to present a defense, a defendant possesses the right to represent himself or herself. (*Faretta v. California*, *supra*, 422 U.S. 806, 819 [95 S.Ct. 2525, 2533] (*Faretta*).)

(*Marshall*, *supra*, 15 Cal.4th at p. 20.) Appellant's case graphically demonstrates both Judge Riemer's dilemma in reconciling those rights in the unique context of fulfilling his duties under section 190.4, subdivision (e), and his erroneous choice in allowing appellant to represent himself.

In determining whether appellant actually and properly invoked the right to self-representation, this Court examines the entire record de novo. (*Stanley*, *supra*, 39 Cal.4th at p. 932; *People v. Dent* (2003) 30 Cal.4th 213, 217-218.) As this Court pointed out in *Marshall*, "[t]he United States Supreme Court has concluded in numerous cases and a variety of contexts that the federal Constitution requires assiduous protection of the right to counsel" while "not extend[ing] the same kind of protection to the right of self-representation." (*Marshall*, *supra*, 15 Cal.4th at p. 20.) Whereas the right to be represented by counsel is self-executing, the right to represent oneself must be asserted unequivocally and in a timely fashion in order to enforce the strong presumption against a waiver of the right to counsel. (*Id.* at pp. 20-21; *Faretta*, *supra*, 422 U.S. at p. 835.)

The Sixth Amendment right of self-representation may properly be

denied when a defendant's request to proceed pro se is made out of a temporary whim, annoyance or frustration, as such a request is not unequivocal. (*Stanley*, *supra*, 39 Cal.4th at p. 932; *Marshall*, *supra*, 15 Cal.4th at p. 21.) As this Court noted in *Stanley*, "[e]quivocation, which sometimes refers only to speech, is broader in the context of the Sixth Amendment, and takes into account conduct as well as other expressions of intent." (*Stanley*, *supra*, 39 Cal.4th a p. 932, quoting *Williams v. Bartlett* (2d Cir. 1994) 44 F.3d 95, 100.) This Court has also observed that the high court's emphasis in *Faretta* "on the defendant's knowing, voluntary, unequivocal, and competent invocation of the right suggests that an insincere request or one made under the cloud of emotion may be denied." (*Marshall*, *supra*, 15 Cal.4th at p. 21.)

This Court has endorsed the proposition "that in order to protect the fundamental constitutional right to counsel, one of the trial court's tasks when confronted with a motion for self-representation is to determine whether the defendant truly desires to represent himself or herself." (*Marshall*, *supra*, 15 Cal.4th at p. 23; citing *Jackson v. Ylst* (9th Cir. 1990) 921 F.2d 882, 889.)

> The court faced with a motion for self-representation should evaluate not only whether the defendant has stated the motion clearly, but also the defendant's conduct and other words. Because the court should draw every reasonable inference against waiver of the right to counsel, the defendant's conduct or words reflecting ambivalence about self-representation may support the court's decision to deny the defendant's motion. A motion for self-representation made in passing anger or frustration, an ambivalent motion, or one made for the purpose of delay or to frustrate the orderly administration of justice may be denied.

(*Marshall*, *supra*, 15 Cal.4th at p. 23.)

Here, the record clearly shows that appellant sought self-representation not for the purpose of making his "defense" at the section 190.4, subdivision (e), hearing, but instead to expedite the proceedings and to stand mute before the court to ensure that the automatic motion to modify the jury's death verdict would be denied. As such, appellant's frustration with the legal process unfolding in the trial court was manifest, including his mistaken perceptions that any advocacy on his behalf seeking to change the jury's verdict from death to life imprisonment without possibility of parole was futile as well as inimical to his claim of innocence.

More significantly, appellant made it unmistakably clear that he did not wish the proceedings before the trial court to conclude with a modification of the jury's death verdict; to use appellant's own words, "that's the very worst thing that can happen, therefore, I do wish to represent myself." (1 RT 21.) Given that the trial court's task at a section 190.4, subdivision (e), hearing is to make an independent determination as to whether the weight of the evidence supports the jury's death verdict, appellant's request for self-representation here was clearly made to frustrate the orderly administration of justice by making the proceedings non-adversarial. (*Faretta*, *supra*, 422 U.S. at p. 834, fn. 46; *United States v. Cronic* (1984) 466 U.S. 648, 655; *Singer v. United States* (1965) 380 U.S. 24, 36; see *Pulley v. Harris*, *supra*, 465 U.S. at pp. 51-53; *People v. Rodriguez*, *supra*, 42 Cal.3d at pp. 793-794.)

The record quite clearly demonstrates appellant's frustrations and his desire to end the proceedings as rapidly as possible with a ruling leaving the jury's death verdict intact. First, appellant made abundantly clear his belief that counsel could do nothing for him. Indeed, as appellant phrased it, if he were to be represented by the best criminal defense attorney in the world,

the result would be the same as if appellant represented himself. (1 RT 17.) It may well be the case that appellant's fatalistic attitude in this regard was based upon an uncorrected misunderstanding of the trial court's role in a section 190.4, subdivision (e), proceeding; his description of the legal issues to be decided by the trial court in such a proceeding seems not to comprehend that the trial court must *independently* evaluate the aggravating and mitigating evidence as opposed to determining whether the jury's findings were "enough" for a death sentence – the precise misunderstanding which caused this Court to vacate and remand appellant's death sentence in 2003 in *Burgener III*, *supra*, 29 Cal.4th 833, at pages 890-892. (1 RT 16-17.)

More significantly, Judge Riemer's acknowledgment of appellant's fatalistic attitude toward the proceedings led him to ask a very logical and probative question, revealing a second layer of appellant's true thinking when it came to self-representation. When asked what he believed was the "downside" of representation by counsel if the outcome of the section 190.4, subdivision (e), hearing could not be influenced one way or the other by who was representing him, appellant immediately referred to the length of time it would take for counsel to prepare the case. (1 RT 18-19.) From this false premise (as Judge Riemer explained, he could not decide the case forthwith in any event, because he had to read the voluminous record first and a few months were required to do so), appellant revealed a third aspect of his frustration, i.e., that if counsel remained in the case, his argument in support of granting the section 190.4, subdivision (e), application would be contrary to the result appellant wanted. He complained that his case had been in the state courts for many years and he "had no say" in what had been happening throughout his case, always deferring to what his lawyers

wanted. As an example, he stated that his claim of innocence foreclosed him from "in good conscience" attempting to argue for mitigation. In fact, as appellant put it, "To me, a sentence of life without is worse than death, actually, to me right now where my case is in the courts. I want to get this hearing over with, and, you know, get my case in through the courts before I die of old age." (1 RT 19.)

In making this statement, appellant maintained a position he took as early as at the penalty phase of his original trial, where he had declined to participate, had instructed counsel to not present a case in mitigation, and had counsel read appellant's own statement to the jury requesting a death verdict. (See *Burgener I, supra*, 41 Cal.3d at pp. 540-541.) There, because "[d]efense counsel and his client 'threw in the towel' at the penalty phase, inviting the jury to impose the death penalty," this Court reversed the death judgment, setting the stage for the penalty retrial and the ancillary proceedings now under review in this appeal. (*Id.* at p. 543.) At the section 190.4, subdivision (e), hearing in 2003, when appellant was erroneously permitted to represent himself, his "defense" was, as this Court aptly described it, "very brief. 'The only thing I have to say is I maintain my innocence; therefore, I cannot argue mitigation. That's all I have to say.'." (*Burgener IV, supra*, 46 Cal.4th at p. 240.) In its latest iteration before Judge Riemer, appellant's "defense" was even more succinct. When Judge Riemer asked appellant if he had anything to say in response to the court's tentative ruling, appellant replied, "No, not me, sir." (1 RT 41.) Appellant's case has now come full circle, and his death sentence must again be vacated because his request to represent himself was ambivalent and made for the purpose of frustrating the orderly administration of justice.

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E. The Record Does Not Reflect That Appellant Received Adequate Warning Of The Pitfalls Of Self-Representation

As stated earlier, in *Faretta, supra*, 422 U.S. at pp. 812-835, the high court held that, under the Sixth and Fourteenth Amendments, a defendant in a state criminal trial has a right to the assistance of counsel as well as a corresponding right to self-representation. However, a defendant who elects self-representation may do so only after knowingly, intelligently, and voluntarily choosing to forgo the assistance of counsel. Before a trial court may permit self-representation, it must fulfill a dual duty: first, to ascertain that a defendant who seeks to exercise his right to self-representation has knowingly and intelligently foregone the traditional benefits associated with the right to counsel; and second, to ensure that the record establishes that the defendant knows what he is doing, i.e., that his choice is made with eyes open. (*Faretta, supra*, 422 U.S. at p. 835; *Adams v. United States ex rel. McCann* (1942) 317 U.S. 269, 279.)

This Court has held that "no particular form of words is required in admonishing a defendant who seeks to waive counsel and elect self-representation," and that "the test is whether the record as a whole demonstrates that defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1070.) Furthermore, the scope of a proper advisement of the right to counsel depends on the particular facts and circumstances of the case as well as the stage of the proceedings. (*Iowa v. Tovar* (2004) 541 U.S. 77, 88; *Burgener IV, supra*, 46 Cal.4th at p. 242.) However, at a minimum, a waiver of the right to counsel cannot withstand constitutional scrutiny under the Sixth and Fourteenth

Amendments unless it is preceded by an inquiry and findings by the trial court that the defendant was both competent to stand trial and that his decision to forgo the assistance of counsel was both knowing and voluntary. (*Godinez v. Moran* (1993) 509 U.S. 389, 400-401.)

Faretta mandates that the trial court must make a defendant seeking to represent himself or herself "aware of the dangers and disadvantages of self-representation." (*Faretta, supra*, 422 U.S. at p. 835.) "Although the cases differ on the extent of the admonishments which *Faretta* requires, all are agreed that the court must in some manner indicate to the defendant that self-representation is in most instances a hazardous course of action." (*People v. Fabricant* (1979) 91 Cal.App.3d 706, 712.)

Here, appellant was generally advised of the pitfalls of self-representation, e.g., (1) that he would be opposed by a highly experienced adversary; (2) that the court would not accord him any special dispensations on account of his status; (3) that his decision would be irrevocable and no attorney would be waiting in the wings should he change his mind; (4) that if the section 190.4, subdivision (e), application was denied and he was sentenced to death, on any appeal from such a judgment he could not claim that he had received the ineffective assistance of counsel; and (5) his current counsel's experience in capital cases meant he would leave no stone unturned in attempting to persuade the court that the section 190.4, subdivision (e), application should be granted. (1 RT 16-21.) However, Judge Riemer neglected to advise appellant of a highly significant pitfall of self-representation under the particular circumstances facing appellant at the section 190.4, subdivision (e), hearing, i.e., foregoing defense counsel's superior knowledge of the complex rules of procedure at a section 190.4, subdivision (e), hearing, including the necessity of objecting when

appropriate, could result in a waiver of any claim of error in this highly technical area of the law.

The complexity of section 190.4, subdivision (e), hearings and the importance of having the defendant represented by defense counsel is well-illustrated by the history of appellant's case. For example, in *Burgener II, supra*, 223 Cal.App.3d 427, the People succeeded in obtaining reversal of the granting of appellant's section 190.4, subdivision (e), application because Judge Mortland had improperly considered evidence not heard by the jurors. In *Burgener III, supra*, 29 Cal.4th 833, the denial of appellant's section 190.4, subdivision (e), application was reversed because Judge Heumann had utilized an improper standard in ruling on the application. Significantly, this Court's jurisprudence in reviewing claims of error alleged to have occurred at section 190.4, subdivision (e), hearings conducted after its decision in *People v. Hill* (1992) 3 Cal.4th 959, 1013, became final in 1992 makes it clear that in order to preserve such claims of error for appeal, an appellant must first object at the modification hearing. (See, e.g., *People v. Carisi* (2008) 44 Cal.4th 1263, 82 Cal.Rptr.2d 265, 309; *People v. Riel* (2000) 22 Cal.4th 1153, 1220.) The import of this tightening of the rules is graphically illustrated in the procedural history of this case. Had the "contemporaneous objection" rule announced in *People v. Riel, supra*, 22 Cal.4th at page 1220 been applicable to the People's appeal in *Burgener II, supra*, 223 Cal.App.3d 427, the court of appeal would have been compelled to find that the People's claims of error were waived, and the court would have affirmed Judge Mortland's judgment granting the section 190.4, subdivision (e), application.

The high court has made it clear that foregoing counsel's superior knowledge of the complex rules of procedure and evidence at court

proceedings, including the necessity of objecting when appropriate, is among the dangers of self-representation that are part and parcel of the trial court's "searching or formal inquiry before permitting an accused to waive his right to counsel at trial." (*Patterson v. Illinois* (1988) 487 U.S. 285, 299-300, and fn. 13.) The federal courts have echoed this sentiment. (See, e.g., *United States v. Hayes* (9th Cir. 2000) 231 F.3d 1132, 1138-1139 [suggesting that the trial court advise a defendant seeking self-representation status that, unlike his adversary, he will be exposed to the dangers and disadvantages of not knowing the complexities of procedural and evidentiary rules to permit him to make post-trial motions and protect his rights on appeal].)

For a number of reasons, it is telling that Judge Riemer never once referred to this forfeiture rule for failing to object as a potential pitfall of appellant's decision to proceed pro se. First, Judge Riemer's colloquy with appellant revealed that appellant had no experience in self-representation. Second, having read this Court's opinion in *Burgener IV*, *supra*, 46 Cal.4th 231, Judge Riemer would have necessarily been aware that "[appellant's] formal education after the age of 11 or 12 was rather erratic, that he had spent most of his adult life in prison, and that he suffered from adjustment and personality disorders" (*Burgener IV*, *supra*, 46 Cal.4th at p. 429) and was thus unlikely to have been aware of, or appreciated, the danger confronting him as a result of his ignorance of the forfeiture rule. Third, Judge Riemer had been told by appellant that he was not going to participate in the adversarial process at the section 190.4, subdivision (e), hearing because he believed the result was preordained, and his participation as an advocate for a sentence less than death was inconsistent with his claim of innocence. Fourth, Judge Riemer explicitly sought only

the People's advice so that his decision in this case would be insulated from yet another reversal, knowing full well that appellant was incapable of assisting him in fulfilling his task. Finally, by failing to warn appellant that his failure to object to any errors committed at the section 190.4, subdivision (e), hearing would preclude appellate review, Judge Riemer significantly increased the odds that his decision on the automatic motion for modification of the jury's death verdict would be upheld by this Court on appeal.

In sum, Judge Riemer was well-aware that appellant believed that maintaining his innocence somehow precluded him from the ability to "argue mitigation" at the section 190.4, subdivision (e), hearing. Likewise, Judge Riemer was aware that this was the identical misconception that appellant had articulated in 2003 when his *Faretta* motion was improperly granted by Judge Heumann. This circumstance affirmatively demonstrates that appellant was, and remained, essentially clueless about the nature of the proceedings and the role appointed defense counsel had to play there, notwithstanding any opinion to the contrary by Deputy Public Defender Kersse. Given that appellant had signaled his intent not to participate in adversarial proceedings, Judge Riemer's admonitions about the perils of self-representation, while surely an improvement over those given in 2003 by Judge Heumann, were nonetheless insufficient under *Faretta* to ensure that appellant's choice was made with eyes wide open.

F. The Error Requires Automatic Reversal

In *Burgener IV*, *supra*, 46 Cal.4th 231, this Court vacated appellant's death judgment and remanded for further proceedings because Judge Heumann had committed *Faretta* error in granting appellant's request for self-representation at a section 190.4, subdivision (e), hearing in 2003. It

therefore had occasion to address whether prejudice need be shown, and if so, by which standard it was to be assessed. (*Burgener IV*, *supra*, 46 Cal.4th at pp. 243-245.)

Noting that the United States Supreme Court had not decided whether such error was reversible per se or subject to harmless-error analysis, and that its own pronouncement in *People v. Crayton* (2002) 28 Cal.4th 346 that such error was reversible per se under article VI, section 13 of the state Constitution was merely dicta, this Court examined how the issue of prejudice had been treated in the lower courts of California as well as in the federal circuits. There, it found a roughly even split in the state courts of appeal, but a virtual consensus in the federal circuits that such error was reversible per se, with only the Eight Circuit holding (in *United States v. Crawford* (8th Cir. 2007) 487 F.3d 1101, 1108) that the *Chapman* (*Chapman v. California* (1967) 386 U.S. 18) standard could be applied to a defective *Faretta* waiver at sentencing in the unique circumstance where the sentencing court lacked the authority to impose a more lenient sentence than the one the self-represented defendant actually received. (*Burgener IV*, *supra*, 46 Cal.4th at pp. 243-245.)

Ultimately, this Court found it unnecessary to decide which standard of prejudice applies, because appellant was entitled to relief regardless. (*Burgener IV*, *supra*, 46 Cal.4th at p. 245.) Even under the *Chapman* standard, this Court noted that (1) appellant had not previously represented himself in this case or any other criminal proceeding; (2) there was no evidence that he had sought to abuse his *Faretta* right; (3) there was no evidence he had been offered counsel subsequent to his waiver and had refused it; (4) appellant's formal education after the age of 11 or 12 was substandard, he had spent most of his adult life in prison, and suffered from

adjustment and personality disorders; (4) it could not be said beyond a reasonable doubt that appellant would have waived the assistance of counsel if the trial court had refrained from actively encouraging him to represent himself and had instead advised him of the risks of self-representation; and (5) it could not be shown beyond a reasonable doubt that the resolution of the section 190.4, subdivision (e), application would have been the same had appellant been represented by counsel. (*Ibid.*)

Appellant maintains, as he did in *Burgener IV*, *supra*, 46 Cal.4th 231, that the trial court's error in improperly permitting him to represent himself at the section 190.4, subdivision (e), hearing, is reversible per se. That view is compelled by a series of rulings of the United States Supreme Court recognizing that "some errors necessarily render a trial fundamentally unfair" and the denial of the right to counsel is one such error. (*Rose v. Clark* (1986) 478 U.S. 570, 577, citing *Gideon v. Wainwright* (1963) 372 U.S. 335; *Penson v. Ohio* (1988) 488 U.S. 75, 88 [denial of counsel on appeal presumptively prejudicial]; *United States v. Cronic*, *supra*, 466 U.S. at p. 659 [holding that "a trial is unfair if the accused is denied counsel at a critical stage of his trial"]; *Chapman v. California*, *supra*, 386 U.S. at p. 23 [recognizing that the right to counsel is "so basic to a fair trial that [its] infraction can never be treated as harmless error"]; see also *Cordova v. Baca* (9th Cir. 2003) 346 F.3d 924, 930 [holding "that if a criminal defendant is put on trial without counsel, and his right to counsel has not been effectively waived, he is entitled to an automatic reversal of the conviction"].)

Even if harmless-error analysis is applied, many of the same factors noted by this Court in *Burgener IV*, *supra*, 46 Cal.4th at page 245 are

present in this case. The only differences are that Judge Riemer did not actively encourage appellant to choose self-representation and did a better job of setting forth some of the pitfalls of self-representation in comparison with the earlier proceedings in 2003. These differences do not, however, suffice to save Judge Riemer's ruling under the rigorous *Chapman* standard.

G. Conclusion

Under the compulsion of the Sixth Amendment and *Faretta*, reversal of the death judgment is required, because appellant's constitutional right to self-representation did not extend to the narrow and unique circumstances presented in the section 190.4, subdivision (e) hearing, and Judge Riemer abused any discretion he may have possessed in allowing appellant to represent himself. Even if the federal Constitution afforded appellant the right of self-representation at such a hearing, the instant record does not reflect that appellant made an unequivocal invocation of that right nor does it show that he understood the disadvantages of self-representation, including the risks and complexities of the particular case. Under these circumstances, appellant did not voluntarily, knowingly, and intelligently waive his right to counsel. Consequently, appellant's right to counsel, due process of law, and a reliable penalty determination as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, were all violated by Judge Riemer's error, requiring reversal of the death judgment and a remand to the superior court for the purposes of another hearing on appellant's section 190.4, subdivision (e), application for modification of the death verdict. (*Martinez*, *supra*, 528 U.S. at p. 154, 159-160; *Faretta*, *supra*, 422 U.S. at p. 835.)

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II

JUDGE RIEMER'S DETERMINATION THAT, IN CONDUCTING HIS INDEPENDENT REVIEW OF THE EVIDENCE AT THE AUTOMATIC MOTION TO MODIFY THE JURY'S DEATH VERDICT, HE WAS PRECLUDED FROM CONSIDERING THE PREVIOUS SECTION 190.4, SUBDIVISION (e) FACTUAL FINDINGS OF THE JUDGE WHO PRESIDED AT THE PENALTY RETRIAL CONCERNING THE CREDIBILITY OF THE WITNESSES, WAS REVERSIBLE ERROR

A. Proceedings Below

Because of the self-described "unfortunate procedural circumstances" in which Judge Riemer found himself when called upon to fulfill his duties under section 190.4, subdivision (e), he directed the People to file a brief addressing several questions that were of concern to him.[5] Among those questions, Judge Riemer wanted to know (1) whether he was bound by any prior rulings on previous section 190.4, subdivision (e), applications; and (2) how he was to evaluate the credibility of the trial witnesses on a cold record. (1 CT 58-61.)

As to the first question, Judge Riemer specifically referred to a pleading filed by the People in 1991, at an earlier section 190.4, subdivision (e), proceeding before Judge Heumann, in which it was suggested that Judge Heumann could consider factual findings made at the very first section 190.4, subdivision (e), hearing in this case, before Judge McFarland. Judge Riemer asked if the People still maintained that position, and if so,

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[5] Appellant was invited by Judge Riemer to file a response, but as appellant addressed in Argument I, *ante*, Judge Riemer was aware that appellant had expressed no interest in doing so, and no such response was ever filed.

under what authority.[6] (1 RT 59-60.)

As to the second question, Judge Riemer noted that as part of his duty in conducting an independent review of the strength of the evidence, he was obliged to evaluate the credibility of the witnesses who testified at appellant's penalty retrial, a task usually left to a finder of fact who "has actually heard and seen the witnesses testify." (1 CT 61.) Because he had not seen or heard the witnesses, and was now being asked to make that evaluation on the cold written record of witness testimony from over 20 years ago, Judge Riemer was concerned whether and in what way that circumstance changed or affected his duty to independently evaluate the credibility of the witnesses. (*Ibid.*)

In its written response to the first question, the People, citing *People v. Crew* (2003) 31 Cal.4th 822, asserted that Judge Riemer was not bound by trial courts' rulings on previous section 190.4, subdivision (e), applications. In explaining the position it took in the 1991 proceedings before Judge Heumann, the People argued that it was a logical response to the position taken by appellant before Judge Heumann, where he had argued that the court was bound by the previous factual findings of Judge Mortland. "The point was that if defendant's reasoning held true, then the trial court would not merely be bound by findings by the judge who erroneously granted an application, but also by the judge who erroneously denied an earlier application." (1 CT 69-70.)

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[6] Judge McFarland presided over the original guilt and penalty trial. In *People v. Burgener* (1986) 41 Cal.3d 505 ("*Burgener I*"), this Court reversed the penalty judgment because defense counsel had failed to present any mitigating evidence in the penalty phase in obedience to his client's request. (41 Cal.3d at p. 542.)

As to the second question, how Judge Riemer was to evaluate the credibility of the trial witnesses on a cold record, the People's answer was that the fact that Judge Riemer had not seen or heard the witnesses at the penalty retrial did not change or affect his duty under the law. Citing *People v. Lewis* (2004) 33 Cal.4th 214, and *People v. Moreda* (2004) 118 Cal.App.4th 507, the People argued that necessity required that Judge Riemer only do the best he could to evaluate witness credibility from a written record, and that a judge does not have to have been present at trial to determine whether the jury resolved credibility disputes. (1 CT 71-72.)

In his ruling denying the instant section 190.4, subdivision (e), application, Judge Riemer ruled that in a case, like appellant's, where the judge who presided at the penalty phase retrial is unavailable to reconsider the section 190.4, subdivision (e), application on remand, the governing rule is that '"necessity requires the replacement judge to evaluate the credibility of the witnesses as best he or she can from the written record." (*People v. Lewis*, *supra*, 33 Cal.4th at p. 226.)." (1 CT 88.) Judge Riemer then rejected an argument he attributed to appellant's defense counsel in 1991, i.e., that the trial court was "bound in part" by the factual findings made by Judge Mortland *and* Judge McFarland in previous section 190.4, subdivision (e), applications.[7] Citing language from this Court's opinion in

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[7] Judge Riemer was referring to pleadings filed in 1991 when the section 190.4, subdivision (e), proceedings were heard by Judge Heumann. However, it appears that Judge Riemer conflated a position taken by appellant at that time with the People's response thereto. In its pleadings, *the defense* had argued that Judge Heumann was obliged to defer to Judge Mortland's findings (Vol. 1-A CT re: Modification Motion (2nd Death Verdict) 21-37), whereas it was *the People* who argued in response that the court was only bound to defer to Judge McFarland's findings (1-A CT re:

(continued...)

People v. Crew, *supra*, 31 Cal.4th 822, 859, Judge Riemer held he was not required to consider the implicitly vacated findings of the judges who had earlier ruled on the application. Furthermore, he found that "any attempt to do so would be inconsistent with this Court's duty to conduct its own independent review of the evidence." (1 CT 88.)

B. The Applicable Law

For the purpose of resolving the issues presented here, this Court's summary of the relevant legal principles in *People v. Burgener* (2003) 29 Cal.4th 833 ("*Burgener III*") generally covers much of the ground:

> The task of a judge under section 190.4, subdivision (e) is to review the evidence and, guided by the aggravating and mitigating circumstances set forth in section 190.3, make a determination whether the jury's decision that the aggravating circumstances outweigh the mitigating circumstances is contrary to law or the evidence presented. The evidence presented, of course, refers to "the evidence presented to the jury." (*People v. Lewis* (1990) 50 Cal.3d 262, 287, 266 Cal.Rptr. 834, 786 P.2d 892 [improper to consider probation report]; *People v. Lang* (1989) 49 Cal.3d 991, 1044, 264 Cal.Rptr. 386, 782 P.2d 627 ["the trial court is prohibited by

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[7] (...continued)
Modification Motion (2nd Death Verdict) 38-44). Appellant requests that this Court take judicial notice of these pleadings, which are part of the record in *People v. Burgener* (2003) 29 Cal.4th 833 ("*Burgener III*"). (Evid. Code, §§ 451, subd. (f); 452, subd. (d), (g) and (h); 459.) Judge Mortland's findings will be discussed at greater length in subsection (C) of this argument, *post*. In brief, as they were described in the opinion of the court of appeal in *People v. Burgener* (1990) 223 Cal.App.3d 427 ("*Burgener II*"), Judge Mortland characterized the evidence of appellant's guilt as "somewhat equivocal" and the testimony of the prosecution's two "prime witnesses" (Nora England and Joseph DeYoung) "crucial . . . to [appellant's] conviction," but sufficiently suspect to support a lingering doubt of appellant's guilt. (*Burgener II*, *supra*, 223 Cal.App.3d at pp. 430-432.)

> statute from considering, when ruling on the modification motion, any evidence not presented to the jury during the trial"]; *People v. Burgener*, *supra*, 223 Cal.App.3d at p. 435, fn. 3, 272 Cal.Rptr. 830.)

(*Burgener III*, *supra*, 29 Cal.4th at pp. 888-889, fn. omitted.)

Judge Riemer correctly identified this Court's decision in *People v. Lewis*, *supra*, 33 Cal.4th 214, as stating the law applicable to the jurist placed in the difficult position in which he was thrust, i.e., necessity required that such a jurist determine witness credibility "as best he . . . can from the written record." (*People v. Lewis*, *supra*, 33 Cal.4th at p. 226.) However, in fulfilling its obligation to make a ruling after reweighing the evidence and making an independent determination whether the weight of the evidence supported the death verdict, the trial court is not bound to adopt the views "on subsidiary issues" of the judge who previously heard the section 190.4, subdivision (e), application, whether expressed at the initial hearing or at any time thereafter. (*Burgener III*, *supra*, 29 Cal.4th at p. 889.)

Finally, this Court assesses trial court error in the improper consideration of evidence at a section 190.4, subdivision (e), proceeding in which the automatic motion for modification of the death verdict is denied under the "reasonable possibility" test, i.e., is there a reasonable possibility the error affected the trial court's decision. (*People v. Hernandez* (1988) 47 Cal.3d 315, 373-374; *People v. Heishman* (1988) 45 Cal.3d 147, 201; see *People v. Crew* (1991) 1 Cal.App.4th 1591, 1605-1606.) This test is a variation of the *Chapman* (*Chapman v. California* (1967) 386 U.S. 18) harmless-beyond-a-reasonable-doubt test. (*People v. Crew*, *supra*, 1 Cal.App.4th at pp. 1605-1606.)

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C. Consideration Of Judge Mortland's Findings Would Not Have Been Inconsistent With Judge Riemer's Duty To Conduct An Independent Review

While Judge Riemer was not bound by the factual findings made by Judge Mortland, the judge who first ruled on the relevant section 190.4, subdivision (e), application in this case, Judge Riemer was wrong in concluding that he could not consider Judge Mortland's findings because to do so would be inconsistent with the exercise of his independent judgment.

In virtually every other context or setting where a reviewing court is called upon to make a decision heavily based on witness credibility and demeanor, such reviewing courts accord great deference to the fact-finder who was "on the scene" (see *Oregon v. Kennedy* (1982) 456 U.S. 667, 676, fn. 7) and thus able to see and hear the witnesses' live testimony. At a minimum, such reviewing courts forthrightly recognize how ill-suited they are to conduct "independent review" of credibility determinations. (See, e.g., *People v. Solomon* (2010) 49 Cal.4th 792, 835 ["The trial court and counsel are in a far superior position to evaluate a prospective juror's demeanor and its significance. A speculative argument, made years after the fact, and based solely on a cold record, is merely an exercise in revisionist history"]; *Michael U. v. Jamie B.* (1985) 39 Cal.3d 787, 798 [trial court "is in the best position to assess the credibility of the witnesses"]; accord, *People v. Partida* (2005) 37 Cal.4th 428, 447 (conc. & dis. opn., Baxter, J., and cases collected therein).)

Indeed, for Eighth Amendment reliability purposes, the singular importance of the ability of the judge who presided at the penalty phase of a capital trial to evaluate the correctness of a jury's death verdict on the basis of his or her independent evaluation of the weight of the evidence has been recognized by this Court:

> On its face, section 190.4(e) plainly gives the determination of an application for modification of the verdict of death to *the trial judge* and *the trial judge alone* – not to any judge and certainly not to an appellate justice or an appellate court. The reason for this is evident: the Constitution imposes a requirement of heightened reliability for a verdict of death; only the trial judge has had the opportunity to observe the defendant and the demeanor of the witnesses; therefore, it is only that judge who can make a constitutionally adequate determination as to whether the defendant should be sentenced to death in accordance with the verdict.

(*People v. Allison* (1989) 48 Cal.3d 879, 917-918 (conc. & dis. opn., Mosk, J.), original italics.) As appellant will demonstrate, while Judge Riemer was right to forego the People's invitation to consider Judge McFarland's findings, he was wrong in failing to consider Judge Mortland's findings.

It borders on the facetious to continue to maintain the position, as did the People below, that Judge McFarland's factual findings could be considered, "tit for tat," in the event that Judge Riemer decided to consider Judge Mortland's findings. The critical difference between those two sets of findings is that Judge McFarland's findings were made at a section 190.4, subdivision (e), hearing following the jury's original death verdict in this case. That verdict followed a completely different penalty trial than the one under review by Judge Riemer. Judge Riemer was tasked with reviewing the penalty retrial over which Judge Mortland had presided and where Judge Mortland's findings had been made; not the proceedings before Judge McFarland.

On the other hand, sound reasons existed for Judge Riemer to consider Judge Mortland's findings. In *People v. Lewis*, *supra*, 33 Cal.4th 214, this Court held that necessity required that a substitute section 190.4,

subdivision (e), judge evaluate witness credibility from the written record "as best he or she can." (*People v. Lewis*, *supra*, 33 Cal.4th at p. 226.) It would be anomalous indeed to deprive the judge, asked to perform such a daunting task, of a readily available tool such as the written findings of the trial judge who was ideally situated to make the ruling in the first instance, and especially so where section 190.4, subdivision (e), acts as one of the key "checks on arbitrariness" in California's death penalty scheme. (See *Pulley v. Harris* (1984) 465 U.S. 37, 51-53.) The irony would be great if the zeal to protect appellant's right to independent review by the substitute judge in this case resulted in less, rather than more, reliability, especially where appellant bears no fault for the circumstances which made Judge Mortland unavailable to hear the section 190.4, subdivision (e), application following the People's successful appeal in *Burgener II*, *supra*, 223 Cal.App.3d 427.

Justice Werdegar's observations in a civil case are particularly relevant here:

> Our assessment of reprehensibility in this context is undertaken de novo, or independently, in that we do not defer to findings implied from the jury's award. [Citation.] Making such culpability assessments independently on the basis of a detailed factual record is, to say the least, an unusual task for an appellate court. While appellate judges commonly use their own judgments of comparative culpability to formulate general rules for categories of factual situations, their appraisal of the facts in a particular case is usually directed at deciding whether the evidence supports a finding made by the jury or the trial court. Moreover, an appellate court, relying on a cold record rather than hearing the testimony live, is not as well situated as the jury or trial court to make a fine-tuned culpability judgment about conduct that has been the subject of a trial. While some form of independent assessment is necessary to the constitutional

> review we are required to conduct, therefore, it should be performed modestly and with caution.

(*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 720-721 (conc. & dis. opn., Werdegar, J.).)

There can be no disagreement that Judge Mortland was the judge best suited to hear the section 190.4, subdivision (e), application, assuming his availability. (*Burgener II*, *supra*, 223 Cal.App.3d at p. 436; *People v. Crew*, *supra*, 1 Cal.App.4th at p. 1608, fn. 13.) Indeed, although this Court has declined to accept his view, in *People v. Allison*, *supra*, 48 Cal.3d 879, Justice Mosk posited that only the trial judge who presided over the penalty phase is constitutionally entitled to rehear a section 190.4, subdivision (e), application, and in the event of that judge's unavailability, the only permissible remedy is a reduction of the death sentence to life imprisonment without possibility of parole or a full penalty retrial – remedies the *Allison* majority did not consider. (*People v. Allison*, *supra*, 48 Cal.3d at pp. 917-918 (conc. & dis. opn., Mosk, J.).)

Proceeding with modesty and caution, as Justice Werdegar counseled, would suggest that it was appropriate and indeed advisable for Judge Riemer to at least consider Judge Mortland's factual findings. In no meaningful way would such consideration be incompatible or inconsistent with Judge Riemer's ultimate responsibility to conduct an independent review. After all, as this Court's jurisprudence dictates, the last call was Judge Riemer's to make, but no good reason appears to deprive him of the eyes and ears of Judge Mortland, who was present at the critical time of trial. To the contrary, to the extent that Judge Riemer was able to avail himself of those findings, the accuracy of his determination was likely to be enhanced. That check on arbitrariness, after all, was the underlying purpose

of the section 190.4, subdivision (e), proceeding itself. Consequently, Judge Riemer went too far when he unnecessarily precluded himself from even considering Judge Mortland's findings.

D. The Error Was Prejudicial

The error was prejudicial under the applicable "reasonable possibility" test. Judge Riemer acknowledged that the focus of the defense at the penalty retrial was "on evidence that was offered to suggest the possibility that the defendant was not guilty of the crime." (1 CT 92.) As this Court has recognized, such a theory of lingering doubt may have special resonance as a mitigating factor in deciding which punishment is appropriate:

> Indeed, the nature of the jury's function in fixing punishment underscores the importance of permitting to the defendant the opportunity of presenting his claim of innocence. The jury's task, like the historian's, must be to discover and evaluate events that have faded into the past, and no human mind can perform that function with certainty. Judges and juries must time and again reach decisions that are not free from doubt; only the most fatuous would claim the adjudication of guilt to be infallible. The lingering doubts of jurors in the guilt phase may well cast their shadows into the penalty phase and in some measure affect the nature of the punishment.

(*People v. Terry* (1964) 61 Cal.2d 137, 146.) This is all the more so in a case in which the jury which decided the penalty was not the same jury that had found appellant guilty. (*People v. Gay* (2008) 42 Cal.4th 1195, 1218-19.)

In his findings, Judge Riemer gave credence to the defense made at the penalty retrial – that Nola England was not a credible witness and that the significance of a presumptive blood test on appellant's shoes "was

greatly overstated." On the other hand, while acknowledging the possibility that appellant was framed by Joseph DeYoung, Judge Riemer did not find that the weight of the evidence supported that possibility as being realistic. He found the evidence of guilt, while circumstantial, compelling and any lingering doubt of appellant's guilt insufficient to mitigate against a death sentence. (1 CT 92.)

In *Burgener III*, *supra*, 29 Cal.4th 833, this Court set forth in detail the evidence presented at the penalty retrial. A fair reading of that evidence highlights the essential role the testimony of England and DeYoung played in establishing that it was appellant who was the principal in killing Arias. DeYoung, who competed with appellant for England's affections, had been told by England that appellant had robbed and killed Arias with a gun previously owned by DeYoung. DeYoung, a drug addict and habitual informant, conveyed this information to Detective Harding, and they formulated a plan for DeYoung to meet with appellant and England to get his gun back. When appellant and England arrived for the meeting, they were greeted by the police instead of DeYoung and appellant was arrested in possession of DeYoung's gun. (*Burgener III*, *supra*, 29 Cal.4th at pp. 848-851.)

On the other hand, the circumstantial evidence connecting appellant to the crime was described in mostly equivocal terms. For example, the witness who saw a lone person leaving the 7-Eleven store where Arias was shot described him as a white male with shoulder-length, curly brown hair and wearing a cowboy hat. When arrested approximately 12 hours after the crime, appellant had "long, curly brown hair" and was wearing a cowboy hat "that looked like the hat" seen by the witness. (*Burgener III*, *supra*, 29 Cal.4th at pp. 847-848.) Arias had been shot with a .22-caliber weapon, and

when arrested, appellant was in possession of a .22-caliber handgun. Forensic testing of expended bullets and bullet fragments allowed that these items "could have come from" the handgun found in appellant's possession. (*Id.* at p. 848.) The sole of appellant's left shoe produced a weak presumptive test result for the presence of blood, but there was "insufficient material to perform any other test to confirm the substance as blood." (*Ibid.*) A crumpled 7-Eleven bag with two $5 bills stuck in the wrinkles was found in England's apartment where appellant had spent the night. (*Ibid.*) Four days later, a small bag of .22-caliber bullets was found at a common bathroom at the apartment complex where England lived; these bullets "matched the bullet fragments recovered from Arias's body in their elemental composition and could have come from the same melt of lead." (*Ibid.*)

In light of the above, it is difficult to reconcile Judge Riemer's conclusion that the evidence of guilt was compelling with Judge Mortland's findings that the same evidence was somewhat equivocal (*Burgener II*, *supra*, 223 Cal.App.3d at page 430). With respect to England and DeYoung, Judge Mortland observed: "I'm not thrilled with the prosecution witnesses." (5 CT 1424.)[8] The record amply supports Judge Mortland's distrust of the evidence given by England and DeYoung. It cannot be denied that there was substantial evidence that DeYoung had both a motive and the opportunity to frame appellant. DeYoung admitted that he was jealous of appellant's relationship with England, the gun connected to Arias's killing had belonged to DeYoung, DeYoung was a drug user and an

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[8] The citation is to Volume 5 of the Clerk's Transcript in *Burgener III*, *supra*, 29 Cal.4th 833. In footnote 7, *ante*, appellant requested that this Court take judicial notice of the record in *Burgener III*.

informant who was constantly in trouble with the law and had provided information to the police on previous occasions to barter his way out of legal trouble, and he received $10, 000 from the company which owned the 7-Eleven store where Arias had been killed. (*Burgener III*, *supra*, 29 Cal.4th at pp. 848-851.)

On the basis of the foregoing evidence, it cannot be said that had Judge Riemer taken into account Judge Mortland's "on the scene" assessment of the credibility of the two witnesses essential to a conclusion that appellant was guilty of the capital crime, there is no reasonable possibility his decision would have changed. This is all the more so because Judge Riemer found other mitigating evidence credible under section 190.3, factors (d) and (h), as well as what he considered to be the non-statutory mitigating factor that appellant experienced a traumatic childhood in a dysfunctional family in which he was often scapegoated and unjustly punished by his siblings and parents. (1 CT 90-92.) For this reason, the death judgment must be reversed and the matter returned to the superior court for reconsideration of the section 190.4, subdivision (e), application. (*People v. Lewis* (1990) 50 Cal.3d 262, 287; cf. *People v. Wader* (1993) 5 Cal.4th 610, 666-667; see also *People v. Crew*, *supra*, 1 Cal.App.4th at pp. 1605-1606; *Burgener II*, *supra*, 223 Cal.App.3d at p. 435.)

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CONCLUSION

Because appellant was erroneously permitted to represent himself at the section 190.4, subdivision (e), proceedings, and because the trial court believed itself unauthorized to consider the previous credibility findings of the judge who presided at the penalty retrial, the death judgment must be reversed and the matter remanded for proceedings under section 190.4, subdivision (e).

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender

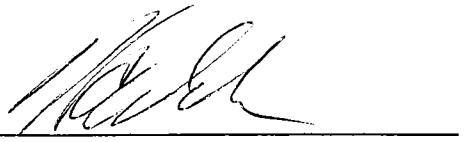
HARRY GRUBER
Senior Deputy State Public Defender

Attorneys for Appellant

CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 8.630(b)(2))

I, Harry Gruber, am the Senior Deputy State Public Defender assigned to represent appellant, Michael Ray Burgener, in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count I certify that this brief is 13,832 words in length, excluding the tables and certificate.

Dated: March 22, 2012



Harry Gruber

DECLARATION OF SERVICE

Re: *People v. Burgener* No. S179181

I, Neva Wandersee, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 221 Main Street, 10th Floor, San Francisco, California, 94105; that I served a true copy of the attached:

APPELLANT'S OPENING BRIEF

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

Office of the Attorney General
Attn: Lilia Garcia, DAG
P.O. Box 85266
110 W. "A" Street, Ste. 1100
San Diego, CA 92186-5266

Riverside Co. District Attorney
3960 Orange Street
Riverside, CA 92501

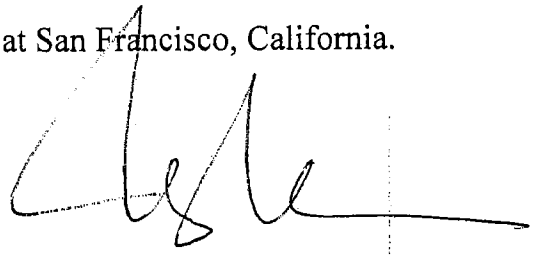
Hon. Craig G. Riemer
Riverside County Superior Court
4100 Main Street, Dept. 45
Riverside, CA 92501

Michael Ray Burgener
(Appellant)

Each said envelope was then, on March 22, 2012, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Signed on March 22, 2012, at San Francisco, California.



DECLARANT

AMENDED
DECLARATION OF SERVICE

Re: *People v. Burgener* No. S179181

I, Neva Wandersee, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 221 Main Street, 10th Floor, San Francisco, California, 94105; that I served a true copy of the attached:

APPELLANT'S OPENING BRIEF

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

Michael RayBurgener
P.O. Box B-26952
San Quentin State Prison
San Quentin, CA 94974

Each said envelope was then, on March 22, 2012, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Signed on March 22, 2012, at San Francisco, California.

DECLARANT