In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, **v.** **ANDREW HAMPTON MICKEL,** Appellant.	**CAPITAL CASE** Case No. S133510

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

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On November 26, 2002, criminal complaint number NCR59621 was filed in Tehama County Superior Court charging appellant, Andrew Hampton McCrae aka Andrew Hampton Mickel, with one count of murder (Pen. Code, [1] § 187, subd. (a)). (1CT 6.) The complaint further alleged that the murder was committed while the victim, David Mobilio, was a peace officer engaged in the performance of his duties, and that appellant knew or should have known that Officer Mobilio was a peace officer engaged in the performance of his duties (§ 190.2, subd. (a)(7)). (1CT 6-7.)

On December 12, 2002, the People filed an Application for Requisition because appellant was determined a fugitive from California, and had fled to New Hampshire. (2CT 431-434.) On that same day the People filed an amended felony complaint for extradition that again charged appellant with first degree murder (§ 187, subd. (a)), and the same special circumstance (§ 190.2, subd. (a)(7)). (2CT 435-436.)

On January 30, 2003, appellant first appeared in court. (2CT 498.) Appellant sought to represent himself and asked for a public defender to be appointed as co-counsel. (IRT 6.) The court did not grant his request at that time and appointed James Reichle to represent him. (2CT 500.) On February 25, 2003, appellant pled not guilty and denied the special circumstance. (3CT 558; IRT 23.)

On April 7, 2003, Mr. Reichle, on appellant's behalf,[2] filed a "Motion and Notice of Motion re Participation in the Proceedings." (3CT 561.) On

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[1] Unless otherwise designated, all further references are to the Penal Code.

[2] Respondent notes "on appellant's behalf" because from the outset of the proceedings appellant sought to represent himself and have an attorney appointed as advisory counsel or co-counsel. To that end, during (continued...)

April 21, 2003, the People filed a response. (3CT 594.) On April 22, 2003, after hearing argument from the parties, the court denied appellant's request to participate in the proceedings. (3CT 621-622.)

The preliminary hearing was on May 21, 2003, and appellant was held to answer. (3CT 672; IRT 222.) On May 29, 2003, an information was filed that charged appellant with one count of murder (§ 187, subd. (a)). (3CT 685.) The information further alleged that the murder was committed while the victim, David Mobilio, was a peace officer engaged in the performance of his duties, and that appellant knew or should have known that Officer Mobilio was a peace officer engaged in the performance of his duties (§ 190.2, subd. (a)(7)). (3CT 685-686; 8CT 1858-1859.) The information alleged the sentencing range was life without the possibility of parole or death. (3CT 686; 8CT 1859.)

On November 20, 2003, appellant's appointed counsel, Mr. Reichle, filed a "Notice of Motion and Points and Authorities: Defendant's Self-Representation As A Matter of Right." (3CT 738, 747.) On November 24, 2003, appellant authored and filed "Defendant's Own Points and Authorities In Support of His Right To Self-Representation." (3CT 751-766, 767; 8CT 1866.) On December 4, 2003, the People filed a response. (3CT 771.)

On December 8, 2003, after hearing from the parties, and receiving and reviewing appellant's written waiver, the court granted appellant's request and appointed Mr. Reichle as advisory counsel. (3CT 786-790; 8CT 1867-1869.) On that same day appellant pled not guilty and denied the special circumstance. (3CT 790; 8CT 1869.)

(...continued)
pre-trial proceedings, while still represented by counsel, appellant authored and filed a document on his own behalf. Respondent, therefore, felt compelled to clarify the individual creating and filing the pleading.

On February 9, 2004, the People informed the court that they were aware of the section 190.3 guidelines and requirements. (3CT 799; 8CT 1870; IIRT 261-262.)

On July 7, 2004, appellant filed a motion for a change of venue. (4CT 862.) On September 10, 2004, the court issued a written ruling granting appellant's motion for a change of venue. (7CT 1729-1733.) On September 13, 2004, the court affirmed that ruling. (7CT 1734; 8CT 1880.) On October 27, 2004, the court ordered the trial moved to Colusa County. (8CT 1839, 1841, 1888.) On November 4, 2004, the Colusa County Superior Court issued an order assigning the Honorable S. William Abel to the case. (8CT 1891.)

Prior to trial the court and the parties exchanged a proposed juror questionnaire and suggested amendments. (8CT 1900-1918, 1922-1940, 1941-1949, 1952-1978.) On February 4, 2005, appellant filed a motion to exclude evidence, and a list of proposed stipulations. (8CT 1979, 1982.) On March 1, 2005, the parties again reviewed the juror questionnaire and more proposed changes were submitted. (8CT 2120-2122.) On March 1, 2005, the court sent an amended proposed juror questionnaire to the parties. (8CT 2125-2153.)

Jury selection began on March 10, 2005 and a jury was impaneled on March 22, 2005. (9CT 2160, 2189.) The guilt phase evidence started on March 25, 2005. (9CT 2226-2232.) On April 5, 2005, the jury found appellant guilty of first degree murder, and that Officer Mobilio was a peace officer who was killed while engaged in the performance of his duties. (10CT 2554-2555, 2557-2558; VIIIRT 1900-1901.)

The penalty phase evidence started on April 6, 2005. (10CT 2568.) On April 8, 2005, the jury returned a verdict of death. (13CT 3569, 3580; XRT 2300.) On April 27, 2005, the court denied the automatic motion for modification. (13CT 3670-3673; XRT 2346, 2351, 2356.) On that same

day the court entered the judgment and death commitment. (13CT 3674-3676.)

This appeal is automatic. (§ 1239, subd. (b).)

STATEMENT OF FACTS

A. Guilt Phase

In the early morning hours of November 19, 2002, appellant ambushed and murdered Police Officer David Mobilio while he was fueling his patrol car at a cardlock station in Red Bluff, California. (VIRT 1398-1399, 1404.) Appellant shot him twice in the back and once in the back of the head with a .40-caliber handgun he had purchased the month before in Olympia, Washington. (VIRT 1370, 1376, 1381.)

1. October and November 2002, appellant's planning and preparation to murder a police officer

Travis Jones was working at Larry's Gun Shop in Olympia, Washington in October 2002, when appellant entered the store and said he was interested in buying a handgun. (VIRT 1370-1371, 1380.) Mr. Jones asked him if he wanted it for self-defense or target practice, and appellant said both. (VIRT 1371.) Mr. Jones asked appellant about the price range, but appellant did not really have a limit on what he wanted to spend. (VIRT 1371.) Mr. Jones showed appellant a few guns and appellant said he wanted a Sig Sauer P229. (VIRT 1372.) Mr. Jones started filling out the paperwork, but appellant looked around and left. (VIRT 1372.)

Appellant returned a week-and-a-half or two weeks later and said he wanted to pick up the gun. (VIRT 1372.) Mr. Jones told him he had not paid for the gun so the paperwork had not been initiated. (VIRT 1373.) Appellant said he would pay for the gun, and they filled out the necessary paperwork. (VIRT 1373-1376.)

Appellant purchased a Sig Sauer P229, .40-caliber handgun with serial number AL 17 781.[3] (VIRT 1376.) Mr. Jones asked him if he wanted ammunition, and if so, for target shooting or defensive purposes. (VIRT 1382.) Appellant said he wanted ammunition for self-defense, and purchased four or five boxes of hollow-point bullets. (VIRT 1382-1383.)

On November 17, 2002, at about 2:50 p.m., Tehama County Deputy Sheriff Martin Perrone left Tehama County Mental Health after dropping off a subject when he observed a maroon 1990 Ford Mustang with Washington license plates, which he ran through his computer. (VIRT 1389; VIIRT 1470-1472.)

On November 18, 2002, the day before Officer Mobilio's murder, around 5:30 or 6:00 p.m., Joshua Schweikhart and Michael Flores went four wheeling in an area north of some railroad tracks in Red Bluff, California. (VIIRT 1457, 1461-1463, 1468.) They were driving separate vehicles. (VIIRT 1457.) They left Breckenridge Road heading north and then down a hill to a spot approximately 300 to 400 yards from Warner's Petroleum. (VIIRT 1458-1459.) They saw a 1992 maroon or red Mustang facing back up the hill. The Mustang's front license plate was covered with a sheet that had been secured with zip ties. The windows were foggy as if someone was inside. (VIIRT 1459, 1465.)

Mr. Schweikhart drove up to the car and saw someone in the back seat on the passenger side. Mr. Flores got out of his vehicle and checked the Mustang. Mr. Schweikhart's headlights illuminated the interior of the car. (VIIRT 1459, 1465-1466.) Both men saw a person inside the car. The person appeared startled or nervous. Mr. Flores saw short, scraggly hair, and the person looked kind of frantic. (VIIRT 1459, 1466.) They went

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[3] Mr. Jones identified People's Exhibit 4 as the gun that he sold to appellant. (VIRT 1379-1380.)

past the car and drove around for about ten minutes. (VIIRT 1461.) When they left, the car was still there. (VIIRT 1461.) Mr. Flores and Mr. Schweikhart remained in the area for 15 to 20 minutes. He and Mr. Schweikhart spoke about how something did not feel right, and they left. When they left, the Mustang was still there. (VIIRT 1467.)

2. November 19, 2002, murder of Officer David Mobilio

On November 19, 2002, Red Bluff Police Officer David Mobilio was working patrol on the overnight shift. Officer Mobilio was usually assigned as a DARE officer, which is a program designed to teach children how to resist drugs and violence. (VIRT 1398-1399.) At about 1:20 a.m., Tasha Johnston, a dispatcher for the City of Red Bluff, had contact with Officer Mobilio, who was checking an alleyway and had asked her to run a license plate. (VIRT 1393-1394.) At about 1:27 a.m., Officer Mobilio went to Warner's Petroleum in Red Bluff to fuel his patrol car. (VIRT 1394.)

Subsequently, another dispatcher, Susan Meyers, did a status check on Officer Mobilio, but there was no response. (VIRT 1394-1395.) Sergeant Ted Wiley, who was in charge and also working patrol, heard the radio communication, and said he would check on Officer Mobilio. (VIRT 1395, 1397-1401.) Sergeant Wiley was informed that Officer Mobilio's last location was Warner's Petroleum, which was where they fueled their patrol cars. (VIRT 1401.) He arrived at Warner's Petroleum and saw one of the department's patrol cars parked by the gas pumps, and as he pulled in, he saw Officer Mobilio. (VIRT 1402.) Officer Mobilio was face down at the north end of the pumps. (VIRT 1402.) Sergeant Wiley did not see anyone else. (VIRT 1403.) Sergeant Wiley called for medical assistance and asked for Officer John Waelty to come to the scene. (VIRT 1403.)

When Sergeant Wiley got out of the car he telephoned dispatch and told them it appeared to be a homicide and to contact the Sheriff's Department for assistance, and to call the Chief and detectives. (VIRT 1403.) He walked within eight to ten feet of Officer Mobilio to get a closer look. (VIRT 1403.) Officer Mobilio was not moving and there was a lot of blood around his head. (VIRT 1404.) Sergeant Wiley was certain Officer Mobilio was dead and could see the wound to the back of his head. (VIRT 1404.) The wound was large and circular and he assumed it was from a gun. (VIRT 1404.)

Next to Officer Mobilio's head was what Sergeant Wiley thought at the time was cardboard or some type of paper. (VIRT 1405.) It had writing on it, including something about a "police action," and had a drawing of a snake. (VIRT 1405.) Officer Waelty arrived and Sergeant Wiley had him block the entrance and secure the crime scene with barrier tape. (VIRT 1405.)

At about 2:00 a.m., Red Bluff Fire Department Engineer Domenic Catona was dispatched to Warner's Petroleum. (VIRT 1412-1413.) Mr. Catona approached Officer Mobilio's body and felt for a pulse, but there was none. (VIRT 1414.) Mr. Catona noticed both a bullet wound to the back of Officer Mobilio's head, and another bullet wound in the middle of his back, just below the shoulder blades. (VIRT 1415.) While assessing the injuries, Mr. Catona noticed, laid neatly near the left side of Officer Mobilio's head, a two-foot by three-foot cloth. (VIRT 1415.) A paramedic arrived and pronounced Officer Mobilio dead. (VIRT 1416.)

3. Appellant flees California

Around 1:30 a.m. on November 19, 2002, Richard Williams, a truck driver for Raley's Supermarkets, had finished making a delivery to the Raley's in Red Bluff and was driving northbound on Interstate 5 when he noticed a car coming up behind him. (VIIRT 1453-1454.) The car's

headlights were pointed up and into his mirror. (VIIRT 1454.) Mr. Williams was going about 55 miles per hour, and the car passed him going 65 or 70. (VIIRT 1454.)

At that point, Mr. Williams noticed the car had its rear license plate covered. (VIIRT 1455.) The car was red with tinted windows, and appeared to be an early 1990s model with a hatchback. (VIIRT 1455.) The car got off at the Jellys Ferry exit, and he did not see it again. (VIIRT 1456.)

Alice Lay lived in southeastern Oregon, where her husband managed a commercial cattle operation. (VIIRT 1575.) It is called Whitehorse Ranch and is about 130 miles from Burns, Oregon. (VIIRT 1576.) The nearest town is about 38 miles away and has a population of 11. (VIIRT 1576.)

On November 19, 2002, Ms. Lay was making lunch at the ranch when an employee came in about 1:00 p.m. and said there was a wreck on the road. (VIIRT 1576.) The employee said he stopped and checked, but could not find anyone, and noticed there were no license plates on the car. (VIIRT 1577.) Ms. Lay called the Sheriff's Office in Burns and told them there was an accident, but nobody was at the scene, and there were no license plates on the car. (VIIRT 1577.)

The accident was on a blind curve so Ms. Lay went to the shop and got her son, Wilson Lay, and materials to flag the wreck. (VIIRT 1577.) When they arrived at the accident scene they saw appellant standing by a fire, and there was an overturned vehicle. (VIIRT 1578.) Ms Lay did not think it was cold enough for a fire and it made her and her son wonder what was going on. (VIIRT 1579, 1593-1595.) Appellant had a bloody face. (VIIRT 1580.) His injury looked like a piece of skin that had been peeled down, and he had glass in his hair. (VIIRT 1580.) They got out of their vehicle and asked appellant if he was all right, and he said that he was.

(VIIRT 1579.)

Mr. Lay asked appellant if there was anyone else and appellant said there was not. (VIIRT 1595.) Ms. Lay asked appellant what he was burning and he said it was just trash. (VIIRT 1580.) The only thing Ms. Lay could make out in the fire was part of a road atlas. (VIIRT 1580.) Mr. Lay saw pieces of paper and maps in the fire pit. (VIIRT 1595.) There were gas cans and a military type backpack. (VIIRT 1595.) Mr. Lay saw other military type items, such as the type of bag that a Claymore mine is stored in, and parachute cord. (VIIRT 1596-1597.) He also saw empty shell casings on the ground, which appeared to be .40 caliber or 9 millimeter. (VIIRT 1597.)

Appellant acted a bit nervous. (VIIRT 1580.) Appellant said he was going too fast and hit loose dirt and then the bank, and the car rolled. (VIIRT 1581.) Ms. Lay asked appellant where he was going and he said that he was just out for a "tour" to get away form things. (VIIRT 1581.)

Ms. Lay asked appellant about his license plates and he said he "threw them away" because he was going to abandon the car. (VIIRT 1581.) Ms. Lay told appellant she had already called the authorities, and that he should not abandon his car. (VIIRT 1581.) She told appellant he needed to find the license plates before the authorities arrived or he would be in trouble. (VIIRT 1581.) Reluctantly appellant traveled 200 or 300 yards looking for the license plates. (VIIRT 1582.) Appellant kept saying that he did not know where he threw them, but eventually he found them. (VIIRT 1582.)

Ms. Lay cleaned up the wreck site, picking up glass or anything that might puncture a tire. (VIIRT 1582.) Her son went further up the road to mark it with flags and paint to warn other drivers. (VIIRT 1582.)

As they picked up items from the crash site, appellant kept saying that he would leave it, but Mr. Lay told him he could not just leave it because it

was where they lived. (VIIRT 1598.) Appellant had items that he removed from the car such as gas cans, clothes, and a backpack. (VIIRT 1583.) Appellant said he did not want any of the stuff and had already gathered everything he wanted in the backpack. (VIIRT 1583.) Mr. Lay said he would take some of the tools if appellant did not want them. (VIIRT 1583.) They gathered some of the tools, a blanket, and some clothes, and put them in the back of the truck. (VIIRT 1584.) They picked up everything they could and put it in the back of the truck. (VIIRT 1598.) Mr. Lay kept a number of the items appellant left behind, including a gun case. (VIIRT 1598-1599.) The gun case had stickers on the end, and Mr. Lay did not tamper with those in any way. (VIIRT 1599.) Also among the items was a "brass catcher," which was designed to catch ejected rounds from guns. (VIIRT 1518, 1600.) Ms. Lay also saw some shotgun shells and empty shell casings. (VIIRT 1583.) She did not know what they were, but they were not as small as a .22 caliber. (VIIRT 1583.)

Ms. Lay was worried because appellant had a head injury and she insisted he sit in the cab of the truck with her son while she rode in the back. (VIIRT 1584.) When they got back to the house they called law enforcement and said they had marked the wreck and the driver was with them at the ranch. She identified the driver as "Andrew McRae." (VIIRT 1500-1503, 1584.) Ms. Lay asked appellant if he was hungry or wanted to get cleaned up. (VIIRT 1584-1585.) Appellant asked if there was a phone to call a taxi. (VIIRT 1585.) Ms. Lay thought it was "funny" because the closest town with those types of services was 130 miles away. (VIIRT 1585.)

Ms. Lay had her son take appellant into the bathroom to get cleaned up. (VIIRT 1585.) When he came out, the piece of skin was still hanging off, and appellant took a pair of scissors and removed it. (VIIRT 1585.)

Ms. Lay asked appellant what he was going to do with the car. (VIIRT 1585.) Appellant said he did not want it and planned on abandoning it. (VIIRT 1585.) Ms. Lay told appellant the tow charges would be outrageous and suggested that if he had the pink slip he could sign it over to someone. (VIIRT 1585-1586.) She told him to sign it over to her son, and then she and her son would use the tractor to dispose of it. (VIIRT 1586.)

Deputy Tim Alexander, from the Harney County Sherriff's Department in Burns, Oregon, arrived and took a statement. (VIIRT 1500-1501, 1588.) Deputy Alexander explained that he needed to go back to the wreck and take pictures and appellant went with him. (VIIRT 1504, 1588.)

Ms. Lay introduced him to the appellant as the driver of the car. (VIIRT 1500-1501, 1503, 1588.) Appellant said his name was "Andrew McRae" and showed Deputy Alexander a Washington State driver's license. (VIIRT 1503-1504.) Appellant had cuts on his forehead and cuts and abrasions on his hands. (VIIRT 1504.)

Appellant wanted to get to town and away from the area, but the town, Burns, Oregon, was 127 miles away. (VIIRT 1505.) Appellant said he was traveling on back roads and got stuck in some ruts, and while trying to get his car free it flipped. (VIIRT 1505.) Appellant said that he wanted to turn over ownership of the car and much of the contents to the Lays or the Whitehorse Ranch for their assistance. (VIIRT 1505.) Deputy Alexander witnessed appellant write out a bill of sale and sign off on the Washington State title. (VIIRT 1505.) Appellant said he had burned a road atlas out of frustration and anger. (VIIRT 1506.)

Appellant had a backpack, plastic bags containing food, and a jacket. (VIIRT 1506.) Deputy Alexander had not searched appellant at that point because appellant had just gotten out of the shower. (VIIRT 1506-1507.)

At some point, Mr. Lay went through the things appellant left. Later that evening, he approached his mother and said, "The guy has serious issues." (VIIRT 1589.) He son showed her an item, but she did not know what it was. (VIIRT 1589.)

Deputy Alexander drove appellant to the crash site, which was approximately six miles away. (VIIRT 1507.) The deputy saw a 1992 red Ford Mustang overturned in the middle of a two-track gravel road. (VIIRT 1507, 1588.) He noted that both license plates were placed on the front bumper leaning against the driver's side tire. (VIIRT 1508.) There were some tools lying around, and one of things that stood out was a new pair of bolt cutters. (VIIRT 1508.)

Deputy Alexander conducted an investigation of the crash, and took some photographs. (VIIRT 1508.) He explained to appellant that he would give him a ride back to town, but before that happened he was going to search appellant's personal belongings. (VIIRT 1508.) When Deputy Alexander opened appellant's backpack he found a black semi-automatic Sig Sauer, .40-caliber handgun. (VIIRT 1509.) The serial number was AL 17 781.[4] (VIIRT 1511.) He ran the serial number through dispatch and the gun came back clear, which meant it was not wanted as a stolen weapon or had been used in a crime. (VIIRT 1511.)

The gun was loaded with a round in the chamber and Deputy Alexander unloaded it. (VIIRT 1512.) Deputy Alexander explained to appellant that he could not take the gun on public transportation, and needed to contact a shipping company to send the gun to himself in Washington. (VIIRT 1512.)

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[4] This is the gun appellant purchased at Larry's Gun Shop the month before Officer Mobilio's murder. (VIRT 1376.)

Deputy Alexander asked appellant why he had not said anything about the gun. (VIIRT 1512.) Appellant said he did not think it was a big deal, and knew Deputy Alexander was going to find it anyway. (VIIRT 1513.) Deputy Alexander also found empty .40-caliber casings and about 30 to 40 12-gauge shotgun shells in appellant's backpack. (VIIRT 1513.) Appellant said he did a lot of target shooting. (VIIRT 1513.)

Deputy Alexander drove appellant to Burns, Oregon, which took approximately two and one-half hours. (VIIRT 1513.) He dropped appellant off at the Silver Spur Motel in Burns, and they had a detailed conversation about how appellant would not be allowed to take the gun on the bus. (VIIRT 1514.) Deputy Alexander assumed appellant was taking the bus to Olympia, Washington. (VIIRT 1514.)

On November 20, 2002, Carolyn Saunders was working for Convenient Services, which sold retail items and operated a bus stop in Burns, Oregon. (VIIRT 1608-1609.) She sold a bus ticket to appellant under the name "Andy McCrae." (VIIRT 1609, 1614.) Appellant said he had been in an accident and that was why he was taking a bus. (VIIRT 1610.) He also said he had a firearm and she told him she did not know if the bus driver would let him take it on the bus. (VIIRT 1610.) She said something to the bus driver, and the bus driver went out, and appellant returned and threw the gun in the trash. (VIIRT 1610.)

Ms. Saunders picked up the gun, and told appellant that if he wanted the gun back she would hold it for him. (VIIRT 1611.) There was some ammunition as well. (VIIRT 1611.) Ms. Saunders took the gun, ammunition, and a copy of the bus ticket, and put them in the safe. (VIIRT 1612.)

4. The investigation

Michael Barnes, a senior criminalist at the California Department of Justice crime lab, was assigned as part of the team that investigated Officer

Mobilio's murder. (VIIRT 1473, 1475.) On November 19, 2002, at about 4:00 a.m., he and criminalist Rebecca Gaxiola, and latent print examiner Barbara Phillips, responded to Warner's Petroleum. (VIIRT 1476.)

Mr. Barnes observed a piece of cloth about two feet by two feet next to Officer Mobilio's body. (VIIRT 1483.) It had wires in the top corners, with a snake image and some wording. (VIIRT 1483.) There was a gun present, a duty weapon, typically used at the Red Bluff Police Department.[5] (VIIRT 1483-1484.) Officer Mobilio's holster was empty, so they assumed the gun was his duty weapon. (VIIRT 1483-1484.) Officer Mobilio had keys and a card lock holder in his left hand. (VIIRT 1486.) Officer Mobilio wore his holster on the right so his right hand was free to draw the weapon if he was able. (VIIRT 1486.)

On November 20, 2002, forensic pathologist Thomas Resk performed an autopsy on Officer Mobilio at the Shasta County Coroner's Officer in Redding, California. (VIRT 1418, 1422.) On external examination, Dr. Resk noted there were two bullet wounds to Officer Mobilio's back, and another to his head. (VIRT 1424.) Officer Mobilio was wearing body armor, but it was bloody because the two gunshot wounds to his torso had gone through the vest. (VIRT 1428.) Officer Mobilio also had an abrasion to his right knee, the back of his left hand, and his forehead. (VIRT 1429.)

The head wound was a devastating injury. (VIRT 1441.) One of the wounds to the back was devastating as well, having traveled through the left lower lung and the abdomen, and then reentering the chest. (VIRT 1441.) Officer Mobilio may have lived for one to several minutes because he was relatively young and healthy, but would not have survived even if he had been at one of the best facilities in the country. (VIRT 1441.)

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[5] Sergeant Wiley saw one of the department issued firearms about five feet from Officer Mobilio's head. (VIRT 1404.)

Dr. Resk opined that the last shot was the one to the back of Officer Mobilio's head. (VIRT 1442.) He was able to testify to a medical certainty that Officer Mobilio was face down on the ground when he was shot in the back of the head. (VIRT 1442.)

Dr. Resk explained that all three gunshot wounds were characterized as "distant gunshot wounds," which means more than three to four feet away. (VIRT 1434-1435.) Dr. Resk recovered projectiles from each of the wounds. (VIRT 1436.)

Mr. Barnes also attended Officer Mobilio's autopsy. (VIIRT 1520, 1522.) Dr. Resk gave the projectiles from the body to Mr. Barnes. (VIIRT 1522.) Dr. Resk recovered a brass bullet jacket (Exh. 33) from the head wound, a mostly intact bullet (Exh. 34), and bullet fragments (Exh. 35) from the wounds to his back. (VIIRT 1522-1524; VIIRT 1722.) Mr. Barnes packaged them and gave them to Senior Criminalist Ron Nies. (VIIRT 1522.) Mr. Nies was asked if he could determine what kind of firearm had fired the bullets. (VIIRT 1723.) Julie Doerr, a criminalist supervisor at the Department of Justice laboratory, received a blood sample from Officer Mobilio and the cloth banner found at the scene of his murder. (VIIRT 1671-1672.)

Within five or six days of Officer Mobilio's murder, law enforcement interest focused on an individual named Andrew Hampton McRae, who was also known as Andrew Hampton Mickel. (VIRT 1385.) Special Agent Jeff Lierly of the California Department of Justice obtained documentation regarding a Washington State driver's license that had been issued on November 7, 2002, in the name of Andrew Hampton McRae. (VIRT 1384, 1386.) Appellant had another Washington State driver's license, which had been issued on October 24, 2002, in the name Andrew Hampton Mickel. (VIRT 1387.) A Ford Mustang, with license plate 5[****]B, was registered to Andrew H. McRae with the same address as the driver's license. (VIRT

1389.) A Mustang with the same license plate was observed by Deputy Perrone in Tehama County on November 17, 2002, two days before Mobilio's murder. (VIIRT 1389, 1470-1472.)

Mr. Schweikhart returned with law enforcement to where he saw the Mustang off Breckenridge Road. He saw zip ties on the ground where the car had been parked, which he pointed out. (VIIRT 1459-1461.)

Mr. Barnes and latent print analyst Barbara Phillips were also directed to the Breckenridge area where Mr. Flores and Mr. Schweikhart had seen the Mustang. (VIIRT 1491.) Mr. Barnes had photographs from the original scene (Warner's Petroleum), including tire and shoe impressions, and was looking for anything at this scene that he could tie to the impressions left at the crime scene. (VIIRT 1491.) At the Breckenridge scene, at the bottom of a hill, was a footwear impression in the mud. (VIIRT 1492.) Mr. Barnes took a photograph and preserved it using a dental stone cast. (VIIRT 1492.)

Appellant was arrested in New Hampshire on November 26, 2002. (VIIRT 1530-1531.)

On November 27, 2002, Mr. Barnes and other law enforcement officers and personnel searched appellant's apartment in Olympia, Washington. (VIIRT 1636.) They found one round of .40-caliber RBCD Performance Plus ammunition in a backpack in the living room. (VIIRT 1636-1637.) They also found pieces of wire and cloth. (VIIRT 1637-1638.) In the trash was a possible template for the snake image that was on the cloth left at the scene of Officer Mobilio's murder. (VIIRT 1640-1641.) There was unique edging on the template that corresponded to the flag, but it did not match exactly in size. (VIIRT 1642-1643.) They also found some receipts from different stores, and rental receipts with the name, "Mickel, A." (VIIRT 1644-1646.)

On December 10, 2002, Deputy Alexander was advised that appellant was a suspect in the murder of a police officer. (VIIRT 1514-1515.) Deputy Alexander returned to Whitehorse Ranch and contacted Mr. Lay. (VIIRT 1515.)

Appellant's vehicle was still there, although the tires had been removed and stored in a barn, and the heater core had been removed and put in another vehicle. (VIIRT 1515-1516.) Some articles of clothing had been donated to a local school, but Deputy Alexander was given the vehicle and the contents that remained. (VIIRT 1516.) One of the items was a case for a Sig Sauer handgun, which had a serial number that matched the serial number on appellant's gun. (VIIRT 1516-1517.) Deputy Alexander also retrieved the "brass catcher," which was designed to catch the shell casing after a weapon had been fired. (VIIRT 1517-1518.)

On December 11, 2002, Mr. Barnes went to Burns, Oregon and met with law enforcement, including Agent Lierly and Deputy Alexander. (VIIRT 1518, 1626.) Mr. Barnes received a Sigarms case with a serial number on the end and a gun. (VIIRT 1626-1627.) The serial number on the gun matched the serial number on the box. (VIIRT 1626-1627.) Deputy Alexander also gave Mr. Barnes the rounds of ammunition that he obtained from appellant's firearm when he first encountered appellant on November 19, 2002. (VIIRT 1518.)

Mr. Barnes subsequently compared the cloth found at the murder scene to fabric from appellant's brass catcher and fabric found in appellant's apartment. The weave type and color were similar. (VIIRT 1636, 1638-1640.)

Mr. Barnes also examined appellant's Mustang and its tires. (VIIRT 1628-1629.) He compared photographs of the Mustang's tires with photographs of the tire impression at the Breckinridge scene. (VIIRT 1629-1630.) The size and pattern were the same. (VIIRT 1630.)

Washington State license plates 5[****]B were inside the car. (VIIRT 1632.) There was a paint brush in the vehicle, and Mr. Barnes noted that the flag that was found at the scene had paint on it. (VIIRT 1632-1633.) There were two types of ammunition: Remington Golden Saber; and, RBCD Performance Plus. (VIIRT 1633-1634.) He received the ammunition from Agent Lierly along with the firearm magazines and a magazine holder. (VIIRT 1634.)

On December 12, 2002, Deputy Alexander returned to the crash scene and searched approximately two square miles surrounding the scene. (VIIRT 1519.) He went to the area where the fire had been. Deputy Alexander dug down and found two burnt computer discs. (VIIRT 1519.)

Law enforcement also contacted Ms. Saunders. (VIIRT 1612, 1616.) They showed her appellant's picture and she told them she put something away for him. (VIIRT 1612, 1614, 1616.) She remembered because she does not normally put things away for people. (VIIRT 1612.) She gave law enforcement officers a photocopy of a bus ticket, a bag containing numerous "firearms related items," a Sig Sauer P229 handgun with serial number AL 17 781, a magazine holder, three magazines, and loose ammunition. (VIIRT 1616, 1617-1618.)

Mr. Nies examined the firearm with serial number AL 17 781.[6] (VIIRT 1723.) He fired some cartridges so that he had cartridge cases and some bullets that he knew were fired from the gun. (VIIRT 1724.) He determined that People's Exhibits 33 and 34 were fired from the same gun, and that 33 had been fired from appellant's gun. (VIIRT 1726, 1757.) As a consequence, People's Exhibit 34 was fired from appellant's gun. (VIIIRT

[6] This was the same gun appellant had purchased in Washington in October 2002, and that Deputy Alexander found in his backpack, and Ms. Saunders held for him at the bus station in Burns, Oregon. (VIRT 1376, VIIRT 1509, 1511, 1616, 1618.)

1757.) The most he could say about Exhibit 35 was that it came from a gun that had the same class of characteristics as appellant's gun. (VIIIRT 1757-1758.)

Latent Print Analyst Barbara Phillips compared appellant's fingerprints with latent prints from two magazines of appellant's gun. She examined a lot of items in this case. (VIIRT 1553, 1703, 1706-1708.) After comparing those prints to appellant's she determined that a print on one of the magazines was the appellant's right index finger, and a print on the other magazine was appellant's right ring finger. (VIIRT 1710-1711.)

On February 4, 2003, Agent Lierly obtained a search warrant to draw appellant's blood. (VIIRT 1553.) He took the blood to the crime lab for DNA comparison. (VIIRT 1554.) On February 4, 2003, Royce Raker, a registered nurse at St. Elizabeth's Hospital in Red Bluff, California, drew appellant's blood pursuant to a search warrant. (VIIRT 1669.) He gave the blood to Agent Lierly. (VIIRT 1670.)

Nicole Duda Shea, senior criminalist with the Department of Justice, conducted a DNA analysis of the wire found at the scene of Mobilio's murder with samples of Mobilio's and appellant's blood. (VIIRT 1553-1554, 1669-1670, 1672, 1681, 1693-1695.) The DNA profile obtained from sample 56-L, the wire at the top of the banner left at the crime scene, contained a mixture of two different DNA contributors. Both of them appeared to be male. (VIIRT 1695, 1697.) She concluded that Officer Mobilio could not be excluded as being a minor contributor, but he was not the major contributor. (VIIRT 1698.) She concluded that appellant could not be eliminated as the major contributor, and Officer Mobilio was still included as the minor contributor. (VIIRT 1701.) Further, all of the DNA that was detected was consistent with the mixture of DNA from these two individuals. (VIIRT 1701.) In other words, there was no other DNA present that could have come from somebody other than appellant or

Officer Mobilio. (VIIRT 1701.) The major contributor to the sample would be expected to occur in unrelated individuals, in one in 50 billion Caucasians, one in 2.5 trillion African Americans, and one in 10 trillion Hispanics. (VIIRT 1701.) Because there are less than 7 billion people on the earth, this is very strong evidence that appellant was the major contributor. (VIIRT 1701-1702.)

Mr. Barnes examined the shoes (Court Exh. 25) appellant was wearing when he was arrested in New Hampshire to determine if the shoes had made any of the shoe impressions that were found at the scenes. (VIIRT 1530-1531.) The first one he compared it to was an impression found at the Breckenridge scene. (VIIRT 1532.) He determined that the sole pattern was exclusive to Payless, the shoe's retailer. (VIIRT 1542.) Mr. Barnes was informed that in that size and lot number, there were 12,102 pairs made at the end of 2002. (VIIRT 1542.) Mr. Barnes opined that appellant's shoe made the impression from the Breckenridge scene. (VIIRT 1541-1547.)

There were several shoe impressions from the Warner Petroleum site as well. (VIIRT 1547-1548.) As to one of the impressions, Mr. Barnes was able to say that it shared size and class characterizations with appellant's shoe, but the impression did not have the detail to let him say that the specific shoe made the specific impression. (VIIRT 1547-1548.) There were two other impressions as well, and all he could say was that the pattern was the same. (VIIRT 1549.)

The prosecution offered several statements appellant made in prior court proceedings in which appellant stated, "Your Honor, I admit that I committed the act that resulted in Officer Mobilio's death...," and "I have no intention of—I have never 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." (VIIIRT 1761.)

Appellant presented no witnesses on his own behalf.

B. Penalty Phase

1. People's case in aggravation

Linda Mobilio met David Mobilio in 1991, and they were married in 1996. (IXRT 1933, 1937.) When her husband was murdered, she was 29 years old and they had a one and one-half-year-old child. (IXRT 1945, 1949.) On November 18, 2002, Officer Mobilio was home with his son. (IXRT 1947.) After she got home from work, Officer Mobilio received a call and he told her he had to go to work. (IXRT 1948.) He called around 9:00 p.m. and they spoke for a few minutes, and he told her goodnight. (IXRT 1948.)

In the early morning hours she was awakened by a pounding on the door. (IXRT 1948.) She heard a voice she recognized and opened the door. (IXRT 1948-1949.) She immediately knew something was wrong and said, "Where's David? Where is he?" (IXRT 1949.) They told her that her husband had been shot while putting gas in the car, and they did not know who did it. (IXRT 1949.)

They had two funeral services. (IXRT 1951.) There was a private one for the family and a large ceremony for the public. (IXRT 1951.) David Mobilio was a good man, friend, husband, and father. (IXRT 1954.)

Red Bluff Police Chief Al Shamblin first met Officer Mobilio when he was a patrol sergeant and Officer Mobilio was a deputy on the same shift. (IXRT 1956.) Officer Mobilio loved being a police officer, and worked hard to get there. (IXRT 1959.)

On the night that Officer Mobilio was murdered, Chief Shamblin was the commander in charge of the patrol divisions. (IXRT 1961.) He

received a call from dispatch just before 2:00 a.m., and was told that Officer Mobilio had been killed. (IXRT 1961.) The hardest thing about that night was going to Officer Mobilio's house to tell his wife. (IXRT 1964.)

Paul Nanfito met Officer Mobilio at a gym in Red Bluff. (IXRT 1980.) At that time, Officer Nanfito was a patrol sergeant and also served as the reserve coordinator. (IXRT 1980.) He noticed that Officer Mobilio was wearing police academy sweats and approached him about working for the department. (IXRT 1980.) Officer Nanfito explained that it perhaps would have been more understandable had Officer Mobilio been killed in a confrontation with a violent individual or in an accident during a pursuit, but it did not make sense that he was shot in the back while fueling his patrol car. (IXRT 1985.)

Red Bluff Police Officer Brett McAllister was scheduled to work the shift that Officer Mobilio covered on the night he was murdered. (IXRT 2002-2004.) He found out about Officer Mobilio's murder at about 6:30 or 7:00 a.m., when other co-workers came to the house and told him. (IXRT 2004.) Initially, he was in shock, and then it hit him that Officer Mobilio was working his shift and he felt enormous guilt. (IXRT 2004.) The guilt has never gone away. (IXRT 2004.) Officer Mobilio's family told him that it was not his fault. (IXRT 2005.)

Richard Mobilio, David Mobilio's father, testified that he and his family will live with the grief and anger for the rest of their lives. (IXRT 1972.) Laurie Mobilio, David Mobilio's mother, testified that her son loved being in law enforcement and worked hard to get through the academy. (IXRT 1990-1991.) She knew Officer Mobilio was happy with his profession and his life. (IXRT 1996.) She wanted the jury to understand how difficult this loss had been for her family, and wanted them to know him as a person, not just for the uniform he wore. (IXRT 1997.)

C.M. was in elementary school in November 2002, and participated in the DARE program, which Officer Mobilio taught. (IXRT 1974.) The DARE program teaches children to say no to drugs, and the impact drugs and alcohol can have on your life. (IXRT 1975.) One day she was at school and her teacher heard that a Red Bluff police officer had been killed. (IXRT 1977.) They said a prayer because they hoped it was not Officer Mobilio. (IXRT 1977.) About midday, they learned that it was Officer Mobilio, and they all broke down. (IXRT 1977.)

2. Defense case in mitigation

Appellant testified that he was not trying to escape, but simply controlling the manner in which he came forward. (IXRT 2013-2014.) He also said he changed his name because he wanted to protect his family from negative publicity. (IXRT 2014.)

Appellant said that he acted out of patriotism. (IXRT 2014.) He explained that our liberties are under attack. (IXRT 2014.) The government has intruded in our personal decisions, and infringed on the right to bear arms. (IXRT 2015.) Appellant said that when our government tries to improperly imprison people or infringe on our right to bear arms, we have the right to resist them. (IXRT 2016.) In appellant's opinion, American law enforcement and Officer Mobilio, are enforcing laws to wrongfully arrest and imprison people. (IXRT 2016.)

Appellant observed that it was appropriate for him to explain why he felt it was proper to attack and kill someone in defense of liberty. (IXRT 2050.) Appellant explained that he felt connected to American history wherein if the government did something wrong, you resist it to protect your freedoms. (IXRT 2050.) Appellant referred to the Declaration of Independence, the Bill of Rights, and the Constitution. (IXRT 2051-2053.)

Appellant said that one of the reasons he joined the Army was patriotism. (IXRT 2060.) Appellant received extensive training in the

military, including graduating from Army Ranger School. (IXRT 2060.) Appellant was honorably discharged from the military, and never had any disciplinary problems. (IXRT 2064.)

When appellant got out of the Army he visited his older brother in New York. (IXRT 2065.) Appellant then travelled west, to enroll in school in Olympia, Washington. (IXRT 2065-2066.) One morning he woke up and turned on the television to find that it was September 11 and the United States had been attacked. (IXRT 2065-2066.)

On one of the first days in school there was a discussion of how the Israeli government was oppressing the Palestinians, and the United States government played a large role in what the Israeli government was doing. (IXRT 2066.) To appellant this was upsetting, and he decided he needed to go see for himself. (IXRT 2066.) Appellant travelled to Israel. (IXRT 2066.) In a way, the trip turned appellant's world upside down. (IXRT 2066.) Appellant saw firsthand that the United State's government actively funded oppression and then demanded that the people that were oppressed did not resist, and if they resisted, they were terrorists. (IXRT 2066.) Appellant explained that you have a right to resist government agents that are carrying arms to oppress you, but you do not have a right to attack unarmed people who are not combatants. (IXRT 2067.) Appellant said that we have the right to be equally armed with the state and federal law enforcement agencies that are enforcing the laws against us. (IXRT 2075.) Appellant did not feel the same way about the Army, as long as the Army was prohibited from being used in domestic affairs. (IXRT 2075.)

Appellant decided he needed to do something, but he did not know what to do. (IXRT 2076.) He wanted to assert our inalienable right of liberty, and to defend liberty. (IXRT 2076.) Appellant knew that you could try to do it peacefully by working within the system. (IXRT 2076-2077.) Appellant had participated in nonviolent protests while he was in

Israel, and had also participated in nonviolent protests in Washington and Colombia. (IXRT 2079.)

Appellant studied and examined nonviolent and peaceful protest before he determined that it was necessary to use violence to defend liberty. (IXRT 2080.) Appellant determined that when your rights are threatened with violence, you have the right to defend them with violence. (IXRT 2079.) Appellant explained that having armed and uniformed state agents, while nothing new to us today, was never contemplated by the founding fathers. (IXRT 2092.)

Appellant said that our liberties are under attack in this country. (IXRT 2131.) He cited an example of a court case in which a religious organization was told to provide contraception in its employee health care program. (IXRT 2133.) Appellant said that if you have religious beliefs you should be allowed to follow them without the government forcing you not to follow them. (IXRT 2133.) Appellant explained that if the government has the right to tell you what to consent to that undermines the Declaration of Independence. (IXRT 2136.)

Appellant compared the modern War On Drugs to Prohibition, explaining that now that alcohol is legal, there is no violence attached to it. (IXRT 2138-2139.) In appellant's opinion the same logic applies to drugs, and the only reason there is violence attached to drug activity is because drugs are illegal. (IXRT 2139.)

Appellant changed his last name because he wanted to protect his family from being "dragged" into the situation. (XRT 2170.) He chose the name "McCrae" from a character in the book *Lonesome Dove*. (XRT 2171.) Appellant also explained that he came to California to commit this act because he was concerned that if he did it where he was living it would be interpreted as a local dispute. (XRT 2174.) He also chose California

because he believes it is the least gun friendly state, and it is where the war on drugs is fought the hardest. (XRT 2174.)

Appellant knew he could not commit this act in a city because of all the security cameras. (XRT 2175.) Appellant knew that either he or his license plate would be recognized immediately. (XRT 2175.) Appellant looked for a location where he would have a place to put his car, and where he could conduct an "ambush." (XRT 2175.) Appellant did reconnaissance around September 2002, and then returned to Washington. (XRT 2175.) Between September and November, he authored the document he called the "Declaration of a Renewed American Independence." (XRT 2175.) Appellant explained that he said a lot of "stupid" things in it, but there were still things that he agreed with and thought were important. (IXRT 2148.) Appellant said that he did not want to abolish our government, but wanted to alter it so that it respects our rights again. (IXRT 2154.)

On November 15 or 16, 2002, appellant drove all night, and stopped in Oregon and slept for two hours. (XRT 2176.) He went to Weed, California, filled the gas cans, and then stopped at a gas station just north of Redding and filled his car's tank. (XRT 2176.)

Appellant then drove to a rest area between Redding and Red Bluff, and waited until about 4:30 a.m. (XRT 2176.) He then drove directly to the Breckenridge site, where they found the zip ties and his tire tracks, and parked his car. (XRT 2176.) Appellant explained that he "sort of lost heart," and had trouble going through with it. (XRT 2176.) He went to Warner's Petroleum about 10:00 or 11:00 p.m., and waited until 4:30 or 5:30 a.m. (XRT 2176.) Appellant said that several officers came by, but he could not get himself to do it. (XRT 2176-2177.)

Appellant returned to his car and drove to the rest stop between Redding and Red Bluff and went to sleep. (XRT 2177.) He woke up

around noon and thought about "it" a lot. (XRT 2177.) Appellant decided he was right, and it was something that needed to be done. (XRT 2177.) Appellant went back to the gas station north of Redding because he did not want to purchase anything with his ATM card around Red Bluff. (XRT 2177.) He then drove to the rest stop and waited until about 4:30 p.m. to drive to the Breckenridge site. (XRT 2177.) He waited until 10:00 or 11:00 p.m., and then went back to Warner's Petroleum. (XRT 2177.)

Appellant did not see any law enforcement officers for a long time and fell asleep. (XRT 2177.) Appellant heard a car door slam, and it woke him up. (XRT 2177.) Appellant saw a law enforcement officer, but before he could get ready, the officer left. (XRT 2177.) A short time later, Officer Mobilio arrived. (XRT 2177-2178.) Appellant jumped up and ran across the fueling area. (XRT 2178.) He stumbled and made a scraping sound, which Officer Mobilio heard. (XRT 2178.) Officer Mobilio was looking over his shoulder and saw appellant coming, and appellant shot until Officer Mobilio went down. (XRT 2178.) Appellant kept shooting at him as he went down, and then shot him in the head when he was on the ground. (XRT 2178.) Appellant left the flag and ran back to his car. (XRT 2178.)

Appellant also explained that the reason he used the brass catcher and covered his license plates was so that he could control the manner in which he came forward. (IXRT 2094.) In other words, he was not trying to escape, but to control the manner in which he came forward. (IXRT 2095-2096.)

Appellant intended to drive to Boise, Idaho, to an Internet café to send out the "Declaration of a Renewed American Independence," but he wrecked his car so he did not make it to Boise. (XRT 2179.) When appellant wrecked his car, he had computer disks with e-mail addresses of people that he was not connected with, but whom he believed would think what he was fighting for was important. (XRT 2179.) Appellant did not

want them to be implicated when they had nothing to do with it, so he burned the disks. (XRT 2179-2180.) Deputy Alexander took him to Burns, Oregon, and appellant took a bus to Portland, and then Olympia. (XRT 2179.)

Appellant had extra copies of the computer disks in Olympia, which he collected and then returned to Portland. (XRT 2180.) At an Internet café in Portland, he sent out the writings and then took a bus back to Olympia. (XRT 2180.) He went to Seattle and to another Internet café and sent the writings again, and then sent the letters to his parents and other people he thought law enforcement would track down. (XRT 2180.) Appellant sent the letters to his parents and the other people because he wanted it to be clear that he alone was involved. (XRT 2168.) He also wanted those people to know that they would probably be contacted by law enforcement and questioned. (XRT 2168.)

Appellant flew to Vermont and then took a bus to New Hampshire. (XRT 2180.) Appellant explained that he went to New Hampshire to attempt to have a trial to mock the process by which corporations can be charged with crimes. (IXRT 2144.) He specifically chose New Hampshire to incorporate because that State Constitution guarantees the right to revolution. (IXRT 2145.) Appellant said he wanted to control the manner in which he came forward, and did not want to be arrested in secret. (XRT 2175.) He wanted to be able to get to New Hampshire to come forward and make a statement about personal responsibility. (XRT 2175.)

Appellant had a family friend, Lois Raimondo, who is a journalist for the Washington Post. (XRT 2180.) Appellant called her and told her he would be on the East Coast for Thanksgiving break, and that he wanted to meet up with her. (XRT 2181.) When he got there, he called her and told her he had lied to her, and wanted to get in touch with her because she was a reporter. (XRT 2181.) He also e-mailed her the writings. (XRT 2181.)

Ms. Raimondo convinced him to call his parents because he might not get a chance to do it later. (XRT 2185.) Appellant's parents told him they had to turn him in. (XRT 2185.)

He went to a local Kinko's and posted the writings on several websites. (XRT 2185.) The next morning, appellant woke up to a phone call from an FBI agent who informed him that law enforcement was at the hotel. (XRT 2185.) Appellant told them he would come out, but the only thing he wanted beforehand was for a reporter from a local newspaper to come to the hotel. (XRT 2185.) The reporter arrived, appellant spoke to her, and then surrendered. (XRT 2186.)

Stan Mickel, appellant's father, is a professor of Chinese language at a university in Ohio. (IXRT 2024.) On November 25, 2002, he was working with students in his office when his phone rang. (IXRT 2024.) Because he was working he did not answer. (IXRT 2024.) About ten minutes later the department secretary came in and said there was someone he knew on the phone who needed to talk to him. (IXRT 2024.)

On the phone was Lois Raimondo, who told Mr. Mickel that she had spoken to appellant, and appellant referred to having killed someone. (IXRT 2025.) Mr. Mickel dismissed his students and then looked up a website that Ms. Raimondo had mentioned in their conversation. (IXRT 2025.) He looked at the website for the City of Red Bluff, and then for the police department. (IXRT 2025.) On the website for the police department, they had a picture of Officer Mobilio. (IXRT 2025.) Mr. Mickel called his wife and told her she needed to come home. (IXRT 2026.)

When he got home, there were two letters from appellant in the mailbox. (IXRT 2026.) One of the letters was addressed to him and the other was to appellant's mother. (IXRT 2026.) Appellant wrote in the letter to his father that they had had their differences, and it would be hard

for him to accept what appellant was doing. (IXRT 2027.) Appellant wrote that he was trying to make the world a better place. (IXRT 2027.) The letter discussed activities in Red Bluff between November 16th, and the 21st. (IXRT 2027.) Appellant also explained that he had changed his name. (IXRT 2026.)

Appellant's mother arrived home, and they decided to contact a lawyer. (IXRT 2028.) Mr. Mickel decided to try and reach appellant by phone. (IXRT 2028.) He had information that appellant might be in Concord, New Hampshire, and tried to reach appellant there. (IXRT 2028.) He called a hotel and asked for "Andrew McCrae," and was sent to voice mail where he left a message. (IXRT 2029.)

Subsequently, appellant spoke to his father on the phone and they discussed what appellant had done. (IXRT 2029.) Mr. Mickel told appellant he would need to tell law enforcement where appellant was, and appellant said, "You do what you have to do." (IXRT 2029.) Appellant stayed in the hotel room and waited to be arrested. (IXRT 2030.)

On November 25, 2002, appellant's mother, Karen Mickel, spoke to appellant on the phone. (IXRT 2032.) She recalled asking appellant if he had killed the police officer, and appellant said that he had. (IXRT 2032.) She recalled that appellant's father said they were going to have to turn appellant in, and appellant wanted to contact some newspapers to get his story out. (IXRT 2032.) They had to turn appellant in to ensure his personal safety, and to make sure nobody else was hurt. (IXRT 2034.) Appellant told them he did not have the gun any more. (IXRT 2034.)

Robert McWilliams has a Ph.D. in Public Administration. (IXRT 2100-2101.) Dr. McWilliams explained that "Total Information Awareness" is a system for pulling together and aggregating all of the information about each citizen in the United States. (IXRT 2110.) He explained that there are private companies that collect information on

people and believe they are under no obligation to verify the accuracy of the information or notify individuals that they have it in their possession. (IXRT 2113.) Dr. McWilliams opined that the various computer databases used by law enforcement can be used for good, but could also be used to track down someone who did not deserve it. (IXRT 2129.)

Agent Jeff Lierly explained that by using computer networks, they are able to track down some information quickly. (IXRT 2099.) Agent Lierly had previously written a statement of probable cause. (IXRT 2018.) In that statement it refers to "computer checks." (IXRT 2022.) Agent Lierly recalled that during the investigation he left the command post and received a call from his supervisor to return because there had been a development. (IXRT 2022-2023.) At that point, he learned appellant's name and that there had been information developed out of Ohio. (IXRT 2023.)

ARGUMENT

I. THERE WAS NO SUBSTANTIAL EVIDENCE THAT RAISED A DOUBT AS TO APPELLANT'S COMPETENCY

Appellant contends that the judgment must be reversed because the trial court failed to suspend criminal proceedings when there was substantial evidence which raised a doubt as to his competency. (AOB 39.) Appellant's claim is without merit. Appellant is nothing more than a calculating murderer. From society's perspective appellant is a cold-blooded murderer. From appellant's perspective he is a failed revolutionary. But that does not raise a doubt as to his competency.

In this claim, and others in the opening brief, appellant's counsel attempts to morph society's condemnation of appellant's actions into a claim that he was incompetent. A review of the entire record reveals that appellant is an intelligent, logical, passionate, and misguided murderer.

On the first day appellant appeared in court in California he sought to represent himself. Eventually, the court granted appellant's request. From that point forward, appellant presented coherent and logical legal arguments and briefs. He demonstrated the ability to conduct research, grasp legal issues, advocate for his own interests, and conduct himself appropriately in court. Further, at no point in any of the underlying proceedings in this state did a judge, prosecutor, or appellant's appointed counsel express the slightest doubt as to his competency.

Appellant's claim, and several others in this opening brief, is based in part on proceedings that occurred in New Hampshire. It appears that an attorney, who was retained by appellant's parents before he was arrested, then retained a psychiatrist to interview him. Further, even if the letter generated by the psychiatrist is considered, which the psychiatrist acknowledged was preliminary and incomplete; it falls far short of being substantial evidence of appellant's incompetence. Appellant's claim is without merit and should be rejected.

A. Relevant Facts

1. Appellant's actions

The relevant facts are disturbing but straightforward. In October 2002, appellant purchased a .40-caliber handgun and hollow point ammunition in Olympia, Washington. (VIRT 1371, 1376, 1381, 1383.) On November 7, 2002, appellant obtained a Washington State Driver's license in the name of Andrew Hampton McCrae. (VIRT 1386.)

On November 19, 2002, at about 1:27 a.m. Red Bluff Police Officer David Mobilio was on patrol and went to fuel his patrol car. (VIRT 1394.) Appellant ambushed Officer Mobilio and shot him twice in the back and once in the back of the head. (VIRT 1418, 1422, 1424.)

On November 19, 2002, at about 1:43 p.m., Deputy Alexander of the Harney County Sheriff's Department in Burns, Oregon, responded to the scene of a single rollover accident near Whitehorse Ranch. (VIIRT 1501.) When Deputy Alexander arrived he was introduced to appellant, who identified himself as Andrew McRae. (VIIRT 1503.)

Appellant said he was travelling on back roads and crashed his car. (VIIRT 1505.) Deputy Alexander drove appellant to the crash site, which was about six miles away. (VIIRT 1507.) When they arrived at the crash site, appellant's Ford Mustang was overturned in the middle of the road. (VIIRT 1507.) Deputy Alexander searched appellant's backpack and found the same .40-caliber handgun that appellant had purchased in Washington the month before. (VIIRT 1376, 1508-1509, 1511.) Deputy Alexander told appellant that he would not be able to take the gun on public transportation and would need to arrange to have the gun shipped to himself in Washington. (VIIRT 1512.) Deputy Alexander drove appellant to Burns, Oregon, approximately two and one-half hours away. (VIIRT 1513.)

On November 20, 2002, Carolyn Saunders sold appellant a bus ticket under the name of "Andy McCrae." (VIIRT 1608-1609, 1614.) Appellant said he had a gun and Ms. Saunders said she did not know if the bus driver would let him take it on the bus. (VIIRT 1610.) She spoke to the bus driver and then appellant returned and threw the gun in the trash. (VIIRT 1610.)

Ms. Saunders told appellant if he wanted, she would hold it for him. (VIIRT 1611.) There was some ammunition as well. (VIIRT 1611.) Ms. Saunders took the gun, ammunition, and a copy of the bus ticket, and put them in the safe. (VIIRT 1612.) Later, law enforcement officers came and retrieved the items. (VIIRT 1612-1614.) The serial number on the gun matched the gun that appellant had purchased the previous month in Washington. (VIIRT 1618.) Subsequent ballistics testing matched a brass

bullet jacket and mostly intact bullet that were recovered during Officer Mobilio's autopsy, to this gun. (VIIRT 1715, 1721-1723, 1726; VIII 1757-1758.)

Appellant claimed that he was not trying to escape, but was trying to control the manner in which he came forward. (IXRT 2013-2014.) He also said he changed his name because he wanted to protect his family from negative publicity. (IXRT 2014.) Appellant said that if the government did something wrong, you should resist it to protect your freedoms. (IXRT 2050.) He participated in nonviolent protests, but concluded that when your rights are threatened with violence, you have the right to defend them with violence. (IXRT 2079.)

Appellant said that he came to California to commit this act because he did not want it to be interpreted as a local dispute. (XRT 2174.) He also chose California because he believes it is the least gun friendly. (XRT 2174.) He wanted to be able to get to New Hampshire to come forward to make a statement about personal responsibility. (XRT 2175.)

2. Record settlement in this case

Once he was arrested in New Hampshire appellant was extradited to California. It appears that an attorney retained by appellant's parents hired a psychiatrist. But it also appears that very little if any of this information was presented to the court in appellant's California proceedings.

On March 1, 2010, appellant's counsel in this automatic appeal filed an "APPLICATION TO COMPLETE, SETTLE, AND CORRECT THE RECORD ON APPEAL." (2Supp.CT 43.[7]) Among other documents, appellant sought to include in the record, "The entire court file, including

[7] Respondent notes that there is a Clerk's First Supplemental Transcript on Appeal (2 volumes), and a Clerk's Second Supplemental Transcript on Appeal (1 volume). The citation "2Supp.CT" refers to the latter.

all pleadings and reporter's transcripts, from the New Hampshire proceedings on the State of California's 'Application for Extradition,' which appears at 2CT 431-432." (2Supp.CT 48.)

Appellant's explanation for including the documents in this appellate record was:

> Defendant notes that both parties referenced the New Hampshire proceedings. The District Attorney specifically referenced the New Hampshire file in the People's opposition to defendant's motion that he not be shackled. (3CT 611-619.) Defendant referenced the New Hampshire proceedings in his Motion for Change of Venue, where he stated that after he was arrested in NH, "attorney Sisti, without Defendant's consent and against his express instructions, attempted to lay the foundations 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." (4CT 864-965.) These documents, made part of the appellate record by the parties' references to the New Hampshire proceedings, should be included in the appellate record.

(2Supp.CT 48-49.)

A review of the record reveals the extremely limited nature of the references. For example, the People's opposition to defendant's motion not to be shackled states:

> While incarcerated in New Hampshire, defendant obstructed jail personnel and refused to dress. Defendant chose to remain nude and/or covered by a blanket and appeared in such manner for one of his court appearances, which was conducted with the use of a closed circuit video monitor.

(3CT 612.)

At another point the opposition also states, "Defendant was disruptive and uncooperative with jail authorities in New Hampshire refusing to dress," and "Defendant demonstrated disrespect for the court process in New Hampshire appearing for court wrapped in a blanket." (3CT 616.)

The People repeated these two references at the end of the opposition. (3CT 618.)

The references to the New Hampshire proceedings in appellant's Motion for Change of Venue were similarly limited. It appears, that even prior to his arrest in New Hampshire, appellant's parents retained Mark Sisti to represent him. (4CT 864.) Appellant also stated:

> Once Defendant was arrested, attorney Sisti, without Defendant's consent and against his express instructions, attempted to lay the 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.

(4CT 864-865.)

Appellant also stated:

> Attorney Sisti's unauthorized approach to representing his client solidified a belief throughout the community that the Defendant was either attempting to avoid responsibility for his actions by playing the insanity game, or that he was actually insane and that he did not even know his own name.

(4CT 866.)

The references to the New Hampshire proceedings were limited and it is not clear on this record that the letter from Dr. Drukteinis, M.D., or even the just of its contents, were ever conveyed to the court in this case.[8]

3. Dr. Drukteinis's letter

Further, even if the Drukteinis letter itself is considered, it does not present substantial evidence of appellant's incompetence to stand trial or represent himself. (2Supp.CT 79-84.)

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[8] In Argument II, appellant contends that his attorney's failure to disclose the letter to the court was ineffective assistance of counsel. (AOB 68, 73, 75.)

For example, the first sentence of the letter clarified that Dr. Drukteinis "interview[ed]" appellant at the request of the attorney's office. (2Supp.CT 79.) Dr. Drukteinis made it clear the examination was incomplete, stating:

> In order to complete a full independent psychiatric evaluation I would need to review all police records as they become available including statements of friends and acquaintances with whom Mr. McCrae has had contact over the past year. In addition, a lengthier interview and psychological testing would be necessary.

(2Supp.CT 79.)

The letter discussed appellant's background and political motives. Specifically, appellant's transformation from one of nonviolent political movements to a violent plan of action. (2Supp.CT 80.) The letter states:

> [H]e became involved with various non-violent political movements and associated international travel—some of which he would use as material for course work. For example, in December 2001, he traveled to Israel with the International Solidarity Movement, a citizens group that supports Palestinians. Mr. McCrae says that, while there, he saw more directly the power of the Israeli "police state," and how "laws are based on pretext." He says he felt he "had to do something about it." In April 2002, he was involved in a rally against the World Trade Organization meeting in Seattle, WA, at which he was arrested for falling on top of a woman, reportedly to protect her from police. Mr. McCrae says that he spent the night in jail and charges were dropped, but he believes the police actions were unjust, and "the arrest was just to break up a street party." In June 2002, Mr. McCrae traveled to Northern Ireland and, in July, to Columbia, South America, both of these trips also with non-violent organizations. Finally, in August 2002, he participated in a demonstration outside of the perimeter of the School of Americas in Fort Benning, GA. He says that the School of Americas is established to train foreigners on how to control their population, so that U.S. corporate interests can be introduced into the country. Mr. McCrae says that at this demonstration he saw three of his co-demonstrators arrested when there were climbing over the perimeter fence, and that it

was "eye-opening" for him. Specifically, he indicates that it was "disheartening to see well-motivated people accomplishing nothing...." With that, he became determined to execute his "own violent political action campaign," by "redeveloping (his) approach."

(2Supp.CT 80-81.)

Appellant explained that he made plans to kill a single police officer. (2Supp.CT 81.) As explained in the letter:

> Mr. McCrae says that he believed killing as few [as] people as possible, i.e. only one person, would satisfy his aims because he could then come forward and explain why he did it. He further says he believed that police would then see the "error of their ways or (would) realize that others would take arms in revolution" as he did. Through this, the police would "stop encroaching on freedoms." He expected the public at large to rally behind him.

(2Supp.CT 81.)

The letter summarized Dr. Drukteinis's perception of appellant's mental state at the time of the interview as follows:

> Mr. McCrae presents as a mildly intense young man who was not agitated or belligerent. He showed no signs of aggression or overt paranoia. He calmly and methodically gave his account without any signs of psychotic disorganization of thought. There was a tendency to ramble and to obsess about details, but no pressured speech or flight of ideas. There was no sign of hallucinations, illusions or psychotic perceptions. He denied being depressed at this time. He did admit to having spells in his life of high energy, but said that he is "not bipolar (manic depressive)." He did admit to seeing a counselor once at Evergreen State College following the breakup of a romantic relationship. The details of this are not known. However, he says he determined that it would not do him any good, because the counselor "wouldn't be open to existential, philosophical issues." Mr. McCrae denied that his mental state is disturbed or that he is irrational, saying only that "political issues had (him) stirred." He denied ever hearing voices or seeing things which were not there, and claimed no feelings of unreality, blackouts, or dissociation. He said that he did not have any sleep problems,

and had not been drinking for a couple of months before his "political action campaign." He admitted to some experimentation with drugs, but no addiction.

(2Supp.CT 83.)

Appellant explained his plans for fighting the charges against him as follows:

> Mr. McCrae says he wants to stay in New Hampshire to fight his court case, because of the State's "right to revolution." In the process, he wants to call others to revolution as well. He says he hopes to be released eventually, but at the same time the "politics involved will make that unlikely." He indicates that he plans to plead not guilty because he had a good reason to do what he did, i.e. justifiable homicide. He says that he would not accept a plea of insanity, and wants to fight extradition to California. Mr. McCrae wants the court process to cause a "stir in the press so other people put themselves out on the line... reach out to make the world a better place."

(2Supp.CT 83.)

In the letter Dr. Drukteinis concludes:

> In my opinion, there is evidence at this point that Mr. McCrae suffers from a mental disturbance. He has a chronic and cyclical history of Depressive Disorder, as well as more recent grandiose and persecutory thinking that can be seen in a Delusional Disorder. In Mr. McCrae, this does not appear to represent simply a variant of political beliefs, but an intense preoccupation with the wrongs committed by corporations and law enforcement agencies within U.S. society, while he has a mission to correct by inciting revolution. There is a strong fantasy and irrational expectation to his thinking, coupled with what appears to be a belief that what he did was not wrong. The relatively sudden change in his thinking to this intense set of beliefs also supports that they represent a mental disturbance rather than just a variant of political beliefs. It is not clear what precipitating factors may he been responsible for this, but may include stressors during the fall of 2001, or the emerging of a new phase of a pre-existing mental disturbance. 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 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.
>
> Again, these are preliminary findings that need to be assessed in light of all the discovery that becomes available and further personal interview and testing of Mr. McCrae.

(2Supp.CT 84.)

This letter was not presented to the court in New Hampshire under oath, or even in response to an order from the court to examine appellant and file a report. At best, the "preliminary findings" opines there is "evidence" of a "mental disturbance." (2Supp.CT 84.) Further, the foundation of Dr. Drukteinis's preliminary opinion is flawed in that his conclusion is that appellant's competence is "highly questionable" because appellant refuses an insanity plea and that would remove any "reasonable defense." (2Supp.CT 84.) In other words appellant must be incompetent because he refuses to say that he is insane, and claiming insanity is his only chance to avoid responsibility for Officer Mobilio's murder.

B. Legal Standard

In *Dusky v. United States* (1960) 362 U.S. 402, the United States Supreme Court defined competence to stand trial as a defendant's "'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding'" and "'a rational as well as factual understanding of the proceedings against him.'"

In California, proceedings related to competency are also dictated by statute. Section 1368 provides in relevant part:

> (a) If, during the pendency of an action and prior to judgment, a doubt arises in the mind of the trial judge as to the mental competence of the defendant, he or she shall state the doubt on the record and inquire of the attorney for the defendant whether, in the opinion of the attorney, the defendant is mentally

> competent.... At the request of the defendant or his or her counsel or upon its own motion, the court shall recess the proceedings...to permit counsel to confer with the defendant and to form an opinion as to the mental competence of the defendant at that point in time. [ ] (b) If counsel informs the court that he or she believes the defendant is or may be mentally incompetent, the court shall order that the question of the defendant's mental competence is to be determined in a hearing.... If counsel informs the court that he or she believes the defendant is mentally competent, the court may nevertheless order a hearing. Any hearing shall be held in the superior court.

As noted by this Court in *People v. Pennington* (1967) 66 Cal.2d 508, 518 (*Pennington*):

> an accused has a constitutional right to a hearing on present sanity if he comes forward with substantial evidence that he is incapable, because of mental illness, of understanding the nature of the proceedings against him or of assisting in his defense. Once such substantial evidence appears, a doubt as to the sanity of the accused 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.

"Substantial evidence" has been defined as evidence that raises a reasonable doubt concerning the defendant's competence to stand trial. (*People v. Davis* (1995) 10 Cal.4th 463, 527.)

In *People v. Stankewitz* (1982) 32 Cal.3d 80, 91-92, this Court stated:

> This court has previously defined the preliminary showing of incompetency which is necessary to trigger the mandatory competency hearing procedure of section 1367 et seq. Section 1368 speaks in terms of whether a doubt arises in the mind of the judge, and is then confirmed by defense counsel. However, as this court realized 15 years ago in *People v. Pennington* (1967) 66 Cal.2d 508, 516-517 [58 Cal.Rptr. 374, 426 P.2d 942] once the accused has come forward with substantial evidence of incompetence to stand trial, due process requires that a full competency hearing be held. (See *Pate v. Robinson* (1966) 383 U.S. 375 [15 L.Ed.2d 815, 86 S.Ct. 836].) Drawing on *Pate v. Robinson*, *Pennington* set down standards regarding what constituted substantial evidence of incompetence to stand trial:

> "If a psychiatrist or qualified psychologist [citation omitted], 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.)

Here, appellant did not present substantial evidence that he was incompetent, requiring the court to suspend criminal proceedings. First, there is no indication in this record that the Drukteinis letter was ever presented to the trial court. Dr. Drukteinis did not state under oath, with particularity, that appellant, because of a mental illness, was incapable of understanding the criminal proceedings, assisting in his defense, or cooperating with counsel. Further, as Dr. Drukteinis makes clear his examination of appellant was incomplete and his findings were preliminary. The details and conclusory nature of his findings are discussed below.

C. Appellant Did Not Present Substantial Evidence That He Was Incompetent to Stand Trial and Was Therefore Not Denied Due Process

Appellant contends that the court had no discretion to exercise, and was required to suspend proceedings pursuant to section 1368. (AOB 49.) Appellant's claim is without merit. The foundation of appellant's argument that the court had no discretion is *Pennington*, *supra*, 66 Cal.2d at p. 519, which stated:

> If a psychiatrist or qualified psychologist..., 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.

Appellant alleges, "That was the case here." (AOB 50.) Appellant's contention is without merit. Appellant's circumstance is factually and legally distinguishable, and *Pennington* does nothing to advance his claim.

In *Pennington*, a capital case, the defendant entered pleas of not guilty and not guilty by reason of insanity. (*Pennington*, *supra*, 66 Cal.2d at p. 511.) After trial began the defendant interrupted with curses or comments, and at one point announced to the court that he refused to have a lawyer. (*Ibid.*) His attorney moved to suspend the trial pursuant to section 1368, and submitted the affidavit of a clinical psychologist, who had examined defendant and concluded he was insane. (*Id.* at pp. 511-512.)

The trial judge took evidence to assist him in determining if he should declare a doubt as to the defendant's competence to stand trial, and the psychologist who had prepared the affidavit in support of the motion testified. (*Pennington*, *supra*, 66 Cal.2d at p. 512.) The psychologist stated that in his opinion the defendant was incapable of understanding the nature of the proceedings against him and of assisting his attorney in his defense. (*Id.* at p. 512.) Defense counsel stated that a psychiatrist, who had previously treated the defendant, and had also examined him, would testify that he was incompetent to stand trial. (*Id.* at pp. 512-514.) Defense counsel indicated that he would have called the psychiatrist, but his testimony would only have echoed the conclusions of the psychologist. (*Id.* at p. 513.) During the hearing the defendant interrupted and the judge "threatened" to have him gagged. (*Ibid.*) The defendant broke into "obscenities and oaths" and four deputies subdued him. (*Ibid.*) Following a recess, the judge announced that he had ordered the defendant gagged and that the motion for the sanity hearing was denied. (*Ibid.*) The following day, defense counsel said that he discovered the defendant weeping in his cell with abrasions on his wrist, and that the defendant had been hearing voices. (*Ibid.*) The defendant had also been observed displaying his penis

to spectators and shouting for them to bring a "Cracker Jack," which was a reference to a snack he gave to the victim in the case. (*Ibid.*) Defense counsel also offered defendant's records from Atascadero State Hospital. (*Ibid.*) The judge stated the purpose of the proceeding was not to determine the defendant's sanity, but whether or not the judge should declare a doubt as to his competency, and the judge had no doubt. (*Ibid.*) The judge explained that his decision was based primarily on four reports of court appointed psychiatrists, each of whom had found the defendant to be presently sane, and his own observations during trial. (*Ibid.*)

During the remainder of the trial there was evidence that defendant was, at the time of his trial, insane. (*Pennington, supra*, 66 Cal.2d at p. 514.) A psychiatrist, who had previously treated the defendant, testified that the defendant was incapable of assisting in his own defense, and that his condition at trial was worse than it was when the defendant was under his care. (*Ibid.*) A consulting psychologist testified, after testing and interviewing the defendant, that the defendant was actively hallucinating and "grossly" insane. (*Ibid.*)

The defendant argued that insofar as the procedure approved in *People v. Merkouris* (1959) 52 Cal.2d 672, permitted a trial judge to resolve conflicting evidence against a doubt of present competency, it was unconstitutional as applied in cases in which the defendant had come forward with substantial evidence of incompetence to stand trial. (*Pennington, supra*, 66 Cal.2d at pp. 516-517.) This Court considered the then recent Supreme Court decision in *Pate v. Robinson* (1966) 383 U.S. 375, and revised its interpretation of section 1368. (*Pennington*, at p. 517.)

The Court stated:

> When the evidence casting doubt on an accused's present sanity is less than substantial, *People v. Merkouris*, *supra*, 52 Cal.2d 672, 678-679, correctly states the rules for application of section 1368 of the Penal Code. Whether to order a present

> sanity hearing is for the discretion of the trial judge, and only where a doubt as to sanity may be said to appear as a matter of law or where there is an abuse of discretion may the trial judge's determination be disturbed on appeal. But, when defendant has come forward with substantial evidence of present mental incompetence, he is entitled to a section 1368 hearing as a matter of right under *Pate v. Robinson*, *supra*, 383 U.S. 375. The judge then has no discretion to exercise. Insofar as *People v. Merkouris*, *supra*, 52 Cal.2d 672, and *People v. Lindsey*, *supra*, 56 Cal.2d 324[9], suggest that the judge, because he personally has no doubt as to the accused's sanity, may deny a section 1368 hearing despite substantial evidence of present insanity, they are overruled.

(*Pennington*, *supra*, 66 Cal.2d at pp. 518-519.)

This Court applied its conclusion to the facts of the case before it, and in so doing noted the language regarding psychiatric opinion now cited by appellant. (*Pennington*, *supra*, 66 Cal.2d at p. 519, AOB 49.) But appellant's circumstance is entirely different. First, there is no indication that the letter from Dr. Drukteinis was ever presented to the trial court. Second, even considering the letter, Dr. Drukteinis himself indicated that he did not have sufficient opportunity to examine appellant, did not testify under oath, and did not even submit the letter to the New Hampshire court pursuant to an order or appointment by the court. Finally, even considering the substance of the letter, Dr. Drukteinis's observations are only preliminary and are themselves conclusory and unsubstantiated.

As noted above, it does not appear the letter was ever presented to the court. Appellant candidly acknowledges, "While the Drukteinis report was not itself before the court that did not relieve the trial court of its responsibilities under sections 1367 and 1368 to ensure that the proceedings comported with due process." (AOB 50.) But appellant then advances an argument that is structured as if the letter was before the court.

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[9] *People v. Lindsey* (1961) 56 Cal.2d 324.

For example, appellant contends, "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." (AOB 50.) But a review of the record cited by appellant does not support his contention. On April 22, 2003, in discussing the possibility of closing some of the proceedings to the public, appellant's attorney, Mr. Reichle, stated the following:

> [MR. REICHLE]: Basically I just want to make it clear I am not in any way trying to close or move to close the preliminary hearing itself in any way. As we all know, this being a capital case, everything is recorded and reported. We also know that the press has an important interest in attending public trials.
>
> 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, thus a conundrum.

(IRT 67-68.)

This statement simply does not support appellant's contention that the court was aware of that the letter had been provided by the prosecution in discovery, much less the details included within the letter.

In another example, appellant argues, "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." (AOB 50.) Presumably, appellant is referring to his motion for a change of venue, which appellant filed on July 7, 2004. (4CT 862.) In that document, appellant states:

> Once Defendant was arrested, attorney Sisti, without Defendant's consent and against his express instructions, attempted to lay the 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.

(4CT 864-865)

In another portion of the motion appellant states:

> Attorney Sisti's unauthorized approach to representing his client solidified a belief throughout the community that the Defendant was either attempting to avoid responsibility for his actions by playing the insanity game, or that he was actually insane and that he did not even know his name.

(4CT 866.)

Again, these references do not support appellant's contention that the court was aware of the letter, much less the details included within the letter. Ultimately appellant concludes:

> 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.

(AOB 50, footnote omitted.)

As outlined above, there is little, if any, indication in the record that the court was informed of the details of the proceedings in New Hampshire. Appellant was arrested in New Hampshire and extradited to California. Appellant attempts to import knowledge of the details of the New Hampshire proceedings to the court in California to bolster the claim that the court erred in failing to raise a doubt as to his competency. There is no indication in this record that the court reviewed and considered the letter, and little indication that the court was aware any of the details of the New Hampshire proceedings. As a consequence, any argument that the court

was required to suspend criminal proceedings because of a letter it never saw, is without merit.

Further, even assuming for sake of argument that the court had been presented with the letter it would not have required the court to suspend criminal proceedings. That is because the circumstances and the letter itself contain insufficient assurances of its reliability for it to be considered evidence of anything, and certainly not evidence of appellant's incompetence to stand trial. As noted above, in *Pennington* the Court stated:

> If a psychiatrist or qualified psychologist..., 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.

(*Pennington*, *supra*, 66 Cal.2d at p. 519.)

The letter from Dr. Drukteinis does not meet this standard and therefore fails to provide sufficient assurances as to its reliability.[10] The letter makes clear that there was not "sufficient opportunity to examine" appellant. In the letter Dr. Drukteinis referred to his "preliminary competency to stand trial assessment," and noted that:

> In order to complete a full independent psychiatric evaluation I would need to review all police records as they become available including statements of friends and acquaintances with whom Mr. McCrae has had contact over the past year. In addition, a lengthier interview and psychological testing would be necessary.

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[10] Dr. Drukteinis's letter is also inadmissible hearsay (Evid. Code, § 1200) an issue that was never addressed presumably because the letter was never presented to the court in California.

(2Supp.CT 79.)

Dr. Drukteinis provided his "preliminary findings" (2Supp.CT 79) and clarified in the conclusion that:

> Again, these are preliminary findings that need to be assessed in light of all the discovery that becomes available and further personal interview and testing of Mr. McCrae.

(2Supp.CT 84.)

The contents of the letter, even if they had been presented to the court, were preliminary in nature. Dr. Drukteinis therefore did not have a "sufficient opportunity to examine" appellant as that phrase is contemplated in *Pennington*. The letter therefore could not serve as substantial evidence of appellant's incompetence to stand trial in California.

The preliminary nature of the letter, and its insufficient examination of appellant, are not its only shortcomings. In a footnote (AOB 50, fn. 4) appellant claims:

> 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 a substantial evidence of incompetence.

Appellant summarily dismisses the requirement in *Pennington* that the psychiatrist's professional opinion be conveyed with particularity under oath. To do so he relies primarily on *People v. Tomas* (1977) 74 Cal.App.3d 75, 91. (AOB 50, fn. 4.) Appellant's contention is flawed in several respects. First, as discussed above, the document was not even before the California court. Appellant's argument therefore attempts to bolster the reliability of a document that was never even considered by the court.

Further, *People v. Tomas*, *supra*, 74 Cal.App.3d at page 91, does little to support appellant's claim. In *Tomas*, the appellate court found it probable that, through an oversight, the trial court did not actually consider

a doctor's report, which concluded that the defendant was legally incompetent. (*Id.* at pp. 91-92.) The report was submitted to the court pursuant to an order appointing the doctor to examine the defendant. (*People v. Tomas*, *supra*, 74 Cal.App.3d at p. 91.) The appellate court found the "report was nonetheless available to the court and was substantial objective evidence giving rise to a doubt as to defendant's competence." (*Id.* at pp. 91-92.) The judgment was reversed.

In its analysis the appellate court noted:

> There was substantial evidence of defendant's incompetence to stand trial presented to the court in the form of Dr. Deering's report. Dr. Deering did not testify under oath. However, his report was submitted to the court under an order appointing him to examine the defendant and to file his report with the court.

(*People v. Tomas*, *supra*, 74 Cal.App.3d at p. 91.)

Here, the situation was entirely different. Dr. Drukteinis did not testify under oath, and was not under the order of any court directing him to examine appellant and file a report. In fact, it appears that Dr. Drukteinis was hired by an attorney in New Hampshire that was retained by appellant's parents before appellant was even arrested. And while appellant's New Hampshire attorney may have submitted the letter as an attachment to a motion in New Hampshire there is absolutely no indication that the court in California ever saw the letter, or was familiar with its content. Unlike the situation in *Tomas*, Dr. Drukteinis was not appointed by any court, and certainly not a California court, to examine appellant and then file a report. The contents of the letter are therefore not sufficiently reliable to be relied on by the California court.

Appellant further contends that:

> 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.)

(AOB 51.[11])

The portion of the record to which appellant cites, actually states:

> Once defendant was arrested, attorney Sisti, without defendant's consent and against his express instructions, attempted to lay the foundations 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.)

The information conveyed to the court in this part of the record was that appellant referred to the "unsubstantiated claims" of the attorney. There was certainly nothing conveyed to the court about a report by Dr. Drukteinis. And nothing that "informed [the court] that Dr. Drukteinis *directly linked* appellant's "mental illness" to his competence.

Further, even if Dr. Drukteinis's letter is considered it does not present substantial evidence of appellant's incompetence to either stand trial or conduct his own defense. That is because Dr. Drukteinis's preliminary findings are equivocal and conclusory. Dr. Drukteinis's letter ultimately concludes:

> In my opinion, Mr. McRae'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.

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[11] Appellant generously refers to Dr. Drukteinis's "findings," but Dr. Drukteinis carefully clarified that his findings were preliminary only and the examination was incomplete. (2Supp.CT 79, 84.)

> Again, these are preliminary findings that need to be assessed in light of all the discovery that becomes available and further personal interview and testing of Mr. McCrae.

(2Supp.CT 84.)

Dr. Drukteinis's letter of preliminary findings is equivocal and conclusory. Dr. Drukteinis does not even conclude that appellant is, in his professional opinion, incompetent to stand trial. The furthest Dr. Drukteinis appears willing to go is that appellant's competency is "highly questionable." Dr. Drukteinis does not appear to base that preliminary finding on any specific mental illness, but on appellant's "irrational thinking." In sum, his preliminary opinion appears to be that appellant's competency is highly questionable because he refuses a plea of insanity, and that is his only available defense.[12] The letter does not represent substantial evidence of appellant's incompetence. (See *People v. O'Dell* (2005) 126 Cal.App.4th 562, 572 [expert's opinion cannot constitute substantial evidence if unsubstantiated by facts].) Even assuming for sake of argument the court had knowledge of these preliminary findings; there was no obligation to suspend criminal proceedings.

Appellant contends that *People v. Koontz* (2002) 27 Cal.4th 1041 (*Koontz*), is "highly instructive." (AOB 52.) While *Koontz* may certainly be instructive, it does nothing to advance appellant's claim. In *Koontz*, a capital case, this Court held that the trial court's failure to conduct a competency hearing when defendant elected to represent himself at the conclusion of the preliminary hearing did not deprive the defendant of the constitutional right to due process. (*Koontz*, *supra*, 27 Cal.4th 1041.)

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[12] Legal insanity is a notoriously difficult standard to meet, requiring proof that the defendant was "incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense." (§ 25, subd. (a); *People v. Lawley* (2002) 27 Cal.4th 102, 169-170.)

The defendant alleged that there was substantial evidence of his incompetency, and that he was unable to cooperate with and assist his original appointed counsel, and that after becoming his own counsel was unable to competently prepare and present his own defense. (*Koontz*, *supra*, 27 Cal.4th at p. 1064.) In sum,

> Defendant characterizes his trial as a travesty, punctuated with fits of his incoherent rambling and nonsensical statements, 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. Defendant further asserts that he presented a number of witnesses in his defense who were either not helpful or damaging to the defense.

(*Koontz*, *supra*, 27 Cal.4th at p. 1064.)

This Court concluded that:

> Examination of the record fails to support defendant's claim of incompetency to stand trial. Even supposing defendant is correct that the various examples of his rambling, marginally relevant speeches cited in his briefing may constitute evidence of some form of mental illness, the record simply does not show that he lacked an understanding of the nature of the proceedings or the ability to assist in his defense. To the contrary, defendant (who, it will be recalled, had had extensive prior experience with the criminal justice system) put on evidence, conducted cross-examination and testified on his own behalf.

(*Koontz*, *supra*, 27 Cal.4th at p. 1064.)

Appellant argues that, "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." (AOB 52-53.) While this Court in *Koontz* did distinguish *Howard v. State*, that does not advance appellant's claim, and it is certainly

not the case that, "The evidence in appellant's case was at least as strong as in *Howard*, if not stronger." (AOB 53.)

In *Howard*, the Mississippi Supreme Court reversed a murder conviction and death sentence on the basis, among other reasons, that the trial court erred in failing to declare a doubt as to the defendant's competency, and without holding a hearing to determine his competency, permitted him to act as his own attorney. (*Koontz*, *supra*, 27 Cal.4th at pp. 1064-1065.)

As summarized by the Court in *Koontz*:

> 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. The Mississippi Supreme Court concluded the trial judge was thus apprised of information that should have raised a doubt about Howard's competency and that the court erred in permitting Howard to represent himself without first determining his competency. (*Id.* at pp. 280-284.)

(*Koontz*, *supra*, 27 Cal.4th at p. 1065.)

The Court in *Koontz* compared the evidence in *Howard* to the evidence in the case before it, stating:

> In the present case, prior to defendant's exercise of his right to self-representation, his appointed counsel never raised any question concerning defendant's competency. Unlike Howard, defendant took an active role in pretrial proceedings and voir dire. Moreover, he questioned witnesses concerning the facts of the case and the character of the victim, although his shaky grasp of the concept of legal relevancy did not well serve his cause. Defendant testified and presented argument on his own behalf, although he did not, as a competent attorney would,

> attempt to develop a persuasive case in mitigation. These deficiencies in his self-representation suggest not incompetency to stand trial but, rather, the lack of legal training common to most pro se defendants.

(*Koontz*, *supra*, 27 Cal.4th at p. 1065.)

Here, Mr. Reichle, the court, and the prosecutors, never raised a doubt as to appellant's competency. In each appearance before the court, appellant presented as intelligent, logical, and insightful, and more than capable of representing his own interests.

Appellant's counsel dismisses appellant's political beliefs as a "bizarre theory." (AOB 54.) While appellant's political beliefs are severely misguided, violent, and extreme, they should not be equated with a mental illness rising to the level of substantial evidence of incompetency to stand trial. It is hardly surprising that a percentage of the population in the United States maintain sharp disagreement with some policy or law of the government. Sadly, it is still not surprising that a small percentage of that population consider violence as a legitimate method to advance their position. And finally, and even smaller percentage of that population actually resort to violence. That certainly does not mean those few individuals who actually resort to violence are each incompetent to stand trial. In reality they are criminals who broke laws recognized and supported by the vast majority of the American public.

Appellant's reliance on *People v. Murdoch* (2011) 194 Cal.App.4th 230 (*Murdoch*), is misplaced. (AOB 56.) Appellant contends that, "the evidence of incompetence in appellant's case was equal to or stronger than in *Murdoch*." (AOB 57.) Appellant is incorrect, as discussed above, at all times and during all court proceedings appellant presented as a lucid, logical, and intelligent advocate. That was not the case in *Murdoch*.

In *Murdoch*, the defendant was convicted of assault with a deadly weapon and battery with serious bodily injury. (*Murdoch*, *supra*, 194

Cal.App.4th at pp. 233-234.) The defendant filed a petition for writ of habeas corpus, which the Court of Appeal deemed a notice of appeal. (*Id.* at p. 235.)

In the underlying proceedings in *Murdoch*, at his second court appearance, the magistrate ordered the jail psychological team to examine defendant. (*Murdoch*, *supra*, 194 Cal.App.4th at p. 233) The defendant was not brought into court for that hearing, but at a subsequent hearing the court suspended criminal proceedings pursuant to section 1368. (*Ibid.*) The court assigned a psychologist and a psychiatrist to examine appellant. (*Ibid.*) Both found that defendant had a "major" or "severe" mental illness. (*Ibid.*) They also found he was competent to stand trial due to the effects of the medication he had been prescribed. (*Ibid.*) But there was also information that the defendant only took his medication "sometimes" or that he had stopped taking it. (*Ibid.*) Both experts concluded that the defendant could decompensate and become incompetent if he continued to refuse medication. (*Ibid.*) At a hearing, the court found that the defendant was not incompetent and reinstated criminal proceedings. (*Id.* at p. 234.)

Subsequently, the defendant sought to represent himself, and the court granted his request. (*Murdoch*, *supra*, 194 Cal.App.4th at p. 234) Prior to opening statements, and after a discussion on dealing with exhibits, the defendant said he had photographs and pages out of books, including the Bible, which he wanted to use. (*Ibid.*) In explaining the relevancy, the defendant stated:

> "What I have to do here is I have to demonstrate that there's something else going on in this world that people aware of. I'm going to make allegations about the plaintiffs in this case that they aren't even human, and that they're—" At this point the court interrupted and asked, "The defense is they're not human?" The defendant confirmed that was his defense. He stated that when he used the term "plaintiffs," he meant "both" people who would testify. The court changed the subject, telling

> the defendant that since the witnesses each have a record, the prosecutor may ask them about their prior convictions. Immediately thereafter the defendant stated, "Judge, what I'm going to ask is [if] these individuals are from Sodom and Gomorra. They're individuals that are among us that are not human. There's a saying, 'when pigs fly.' Shoulder blades are symbolic of angelic beings." He went on to say, "Shoulder blades are symbolic of angelic beings. These two that are going to be taking the stand do not have shoulder blades. Okay?" He continued, "All I need to do, okay, if my assertion of their anatomy is correct, they have a bone that runs from here to here. They cannot shrug their shoulders. That's all I'm asking."

(*Murdoch, supra*, 194 Cal.App.4th at p. 234.)

When time came to cross-examine the victim, the defendant stated, "At this time, I don't know if I really think that this is the imposter." The court told the defendant to "[j]ust ask the question." The defendant then asked a single question: "Can you shrug your shoulders like this?" The victim did so, and defendant stated, "That's all I have. This isn't the man that I believe attacked me." (*Murdoch, supra*, 194 Cal.App.4th at p. 235.)

The Court of Appeal recognized that more is required to raise a doubt than a defendant's bizarre actions, and that "more" was present in the case before it. (*Murdoch, supra*, 194 Cal.App.4th at pp. 236-237.) In that case the mental health reports dealt exclusively with defendant's fragile competence and defendant's reliance on medications to remain competent. (*Id.* at p. 237.) The reports also informed the court that the defendant had stopped taking his prescribed medication and warned of decomposition. (*Ibid.*)

In the instant case there is no indication in the record that appellant was taking any medication. More importantly, there is no indication appellant required medication to remain competent. At no point, even if Dr. Drukteinis's letter is considered, has anyone diagnosed appellant with a

"major" or "severe" mental illness.[13] (*Murdoch*, *supra*, 194 Cal.App.4th at p. 233.) Moreover, the court here never expressed a doubt as to appellant's competency, or appointed a psychiatrist or psychologist to examine him and submit a report.

Again, there is no indication that the letter itself, or the details of its contents were provided to the court. In a motion filed November 20, 2003, to support appellant's request to represent himself, James Reichle stated:

> Only if there is substantial evidence before the Court of incompetence to stand trial is the trial court required to make an inquiry by requiring the holding of the appropriate hearings on that issue. *People v. Teron*, *supra*, at 114. There is no such evidence in this case.

(3CT 743.)

It is recognized that trial counsel's failure to seek a competency hearing is not determinative, but is significant because trial counsel interacts with the defendant on a daily basis and is in the best position to evaluate whether the defendant is able to participate meaningfully in the proceedings. (*People v. Rogers* (2006) 39 Cal.4th 826, 848.)

As far as appellant's statements regarding the possible imposition of the death penalty (AOB 57), "a defendant's preference for receiving the death penalty does not invariably demonstrate incompetence." (*People v. Lewis* (2008) 43 Cal.4th 415, 526; *People v. Grant* (1988) 45 Cal.3d 829, 859; *People v. Guzman* (1988) 45 Cal.3d 915, 963-965, overruled on other grounds, *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) Here, it was not so much that appellant stated a preference for the death penalty, but that he resolutely believed his political principles.

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[13] It appears the furthest Dr. Drukteinis was willing to stretch his "preliminary finding" was that there was evidence of a "mental disturbance." (2Supp.CT 84.)

A reasonable doubt as to mental competency sufficient to require a full mental competency hearing exists if at least one expert who is competent to render an opinion, and who has had a sufficient opportunity to conduct an examination, testifies under oath with particularity that, because of mental illness, the accused is incapable of understanding the proceedings or assisting in his or her defense. (*People v. Pennington*, *supra*, 66 Cal.2d at p. 519; *People v. Lewis* (2006) 39 Cal.4th 970, 1047.) That did not happen in this case.

Appellant acknowledges that the letter itself was not before the court. (AOB 50.) Further, even if it had been, the letter was not itself sufficiently reliable to be evidence of anything. Dr. Drukteinis did not testify under oath, and was not under the order of any court directing him to examine appellant and file a report. In fact, it appears that Dr. Drukteinis was hired by an attorney in New Hampshire that was retained by appellant's parents before appellant was even arrested. And while appellant's New Hampshire attorney may have submitted the letter as an attachment to a pleading in New Hampshire there is absolutely no indication that the court in California ever saw the letter, or was familiar with its content. Moreover, even if considered, Dr. Drukteinis's letter of preliminary findings is equivocal and conclusory. Dr. Drukteinis does not even conclude that appellant is, in his professional opinion, incompetent to stand trial. The furthest Dr. Drukteinis appears willing to go is that appellant's competency is "highly questionable." Dr. Drukteinis does not appear to base that preliminary finding on any specific mental illness, but on appellant's "irrational thinking." In sum, his preliminary opinion appears to be that appellant's competency is highly questionable because he refuses a plea of insanity, and that is his only available defense. Further, throughout the entire proceeding appellant presented as an intelligent, rational, and logical advocate. He was engaged and analytical and demonstrated an impressive

grasp of the procedural and substantive aspects of criminal law. There was simply no substantial evidence of appellant's incompetence to stand trial that required the court to declare a doubt and suspend criminal proceedings. Appellant's claim is without merit and should be rejected.

II. APPELLANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL

A. Summary of Argument

The foundation of appellant's second argument, as with the first, is the letter from the psychiatrist that was retained by a defense attorney in New Hampshire. [14] For example, in Argument I appellant claimed, "The court was informed that Dr. Drukteinis *directly linked* appellant's mental illness to his trial competence." (AOB 51.)

Here, appellant essentially argues the opposite, that his appointed counsel, James Reichle's, was ineffective in his purported failure to advise the court of the psychiatric letter, which was prejudicial because it would have constituted substantial evidence of appellant's incompetence to waive counsel, and would have precluded the court form accepting appellant's waiver without further proceedings to determine appellant's competency. (AOB 60.) As discussed more fully below, this issue should not be considered on direct appeal, and is more appropriate in the context of a petition for writ of habeas corpus. Further, even if considered on its merits appellant's claim of ineffective assistance of counsel is baseless. The letter

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[14] In the opening brief, appellate counsel candidly acknowledges that appellant asked him to inform this Court that he did not agree with the decision to assert claims based on his lack of competence. (AOB 58, fn. 5.) It would presumably follow; therefore, that appellant would not agree with appellate counsel's decision to allege ineffective assistance of counsel based on trial counsel's alleged failure to similarly question his competency.

from Dr. Drukteinis to appellant's New Hampshire counsel was not sufficiently reliable to be evidence of anything. Further, even if the contents of the letter are considered the self-described "preliminary finding" based on an incomplete examination falls well short of declaring a doubt as to appellant's competency to stand trial. (2Supp.CT 79-84.) Finally, appellant cannot establish any prejudice.

B. Appellant's Claim Is More Appropriately Brought in Habeas Corpus Rather Than on Direct Appeal

As noted above, a claim of ineffective assistance of counsel is more appropriately decided in a habeas corpus proceeding. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.) Appellant acknowledges that he 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." (AOB 60-61.) Nevertheless, appellant claims that this is one of those "'rare instances where there is no conceivable tactical purpose for counsel's actions....'" (AOB 61.) Appellant is incorrect.

Appellant must contend there is absolutely no reasonable tactical purpose for counsel's actions because that is the only way in which this claim can be addressed on direct appeal.

This Court has:

> [R]epeatedly stressed that [if] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,]...unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim on appeal must be rejected. [Citations.] A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding.

(*People v. Mendoza Tello*, *supra*, 15 Cal.4th at pp. 266-267, internal quotation omitted.)

That appellant's claim is more appropriately addressed by a habeas corpus petition can be seen from the circular nature of appellant's argument. In Argument I appellant claimed the court erred in failing to suspend criminal proceedings based in large part on the contents of the letter from Dr. Drukteinis to his New Hampshire attorney, but in this claim (Argument II) alleges his California attorney was ineffective for failing to advise the court of the letter's content. Subsequently, in Argument III appellant claims that until the court received letters from appellant's family members, after the guilt and penalty verdicts were returned, "the court did not have a complete picture of appellant's mental state." (AOB 81.) In support of that claim appellant points to correspondence from his mother in which she clams appellant was examined by two psychiatrists. (AOB 84.) Although the psychiatrist's out of court statements to appellant's mother, who in turn, conveyed them to the court in writing, has levels of inadmissible hearsay, it is further indication that appellant's claim here is more appropriately addressed in the context of a habeas corpus proceedings. Appellant contends there is no explanation for "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." (AOB 61.)

The record sheds no light as to why Mr. Reichle acted or failed to act in the manner appellant alleges. Mr. Reichle was clearly of the opinion that there was no substantial evidence of appellant's incompetence, because that is exactly what he told the court. (3CT 743.) The information in this record is incomplete, and it is therefore appropriate to reject this claim on direct appeal. For example, the reference in the correspondence from appellant's mother of there being two psychiatrists is the only reference of its kind in the entire record. (AOB 84; 13CT 3634.) If appellant chooses

he may bring this claim in a petition for writ of habeas corpus where it can be appropriately considered on a more complete record.

C. Even If Considered, Appellant's Claim Fails on Its Merits

Nevertheless, assuming for the sake of argument, the claim is properly before the court, it is without merit. Mr. Reichle's performance at all times fell within the broad range of acceptable professional norms, and even if it did not, appellant suffered no prejudice. The standards governing ineffective assistance of counsel claims are well settled. In order for appellant to establish that his trial counsel's assistance was ineffective, he must show: (1) that his counsel's performance was deficient, and (2) that he suffered prejudice as a result of his counsel's deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-692.)

To meet the burden of showing incompetent performance, appellant must demonstrate that his "counsel's representation fell below an objective standard of reasonableness under prevailing professional norms...." (*People v. Kelly* (1992) 1 Cal.4th 495, 519-520; accord *Strickland v. Washington*, *supra*, 466 U.S. at p. 688.) To meet the burden of showing prejudice, appellant must show 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. [Citations.]" (*In re Harris* (1993) 5 Cal.4th 813, 833, internal quotations omitted.) Furthermore, "[r]eviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437, internal quotations omitted.)

The United States Supreme Court has recently noted that:

> "Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. ___, ___, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S., at 689-690, 104 S.Ct. 2052. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." *Id.*, at 689, 104 S.Ct. 2052; see also *Bell v. Cone*, 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S., at 690, 104 S.Ct. 2052.

(*Harrington v. Richter* (2011) ___ U.S. ___, 131 S.Ct. 770, 788, italics in original.)

> In any case, when considering a claim of ineffective assistance of counsel, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.... If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." [Citation.] A defendant must prove prejudice that is a "'demonstrable reality,' not simply speculation." [Citations.]

(*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.)

This Court has noted that the burden is "difficult to carry on direct appeal," and a conviction will be reversed on direct appeal "'only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission.'" (*People v. Lucas*, *supra*, 12

Cal.4th at p. 437, quoting *People v. Zapien* (1993) 4 Cal.4th 929, 980.) In other words, when an ineffective assistance claim is raised on direct appeal, the reviewing court will reverse the conviction only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his conduct. (*People v. Frye* (1998) 18 Cal.4th 894, 979-980, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Again, it should be noted that appellant's counsel has acknowledged that appellant himself does not agree with the decision to assert claims based on his lack of competence. (AOB 58, fn. 5.) Currently, appellant's specific argument 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.

(AOB 68-69.)

Appellant's claim is without merit. Initially, as discussed above, it is not possible to tell from this record what information was in Mr. Reichle's possession, and what reason he may have had for not disclosing that information, because he was never asked. Further, as discussed in Argument I, *ante*, the Drukteinis letter was not substantial evidence of appellant's incompetence. Appellant's parents retained an attorney before appellant was even arrested. (4CT 864.) That attorney asked Dr. Drukteinis to interview appellant. (2Supp.CT 79.) At that time appellant had already basically confessed in the media and taken responsibility for Officer Mobilio's murder. (4CT 864.) Dr. Drukteinis interviewed appellant at the attorney's request and forwarded the letter to the attorney, who in turn attached it as an exhibit to a filing to be submitted

to the New Hampshire court. (2Supp.CT 62, 79.) Further, the Drukteinis letter made it clear that his findings were "preliminary" and carefully noted:

> In order to complete a full independent psychiatric evaluation I would need to review all police records as they become available including statements of friends and acquaintances with whom Mr. McCrae has had contact over the last year. In addition a lengthier interview and psychological testing would be necessary.

(2Supp.CT 79.)

Appellant contends that 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." (AOB 69.) But there was no substantial evidence of appellant's incompetence.

As discussed in Arguments IV and V, *post*, appellant at all times presented as a logical, intelligent, and skilled advocate on his own behalf. Further, as discussed in Argument I, *ante*, even if the substance of Dr. Drukteinis's letter is considered it is not substantial evidence of appellant's incompetence and Mr. Reichle made an acceptable decision not to come forward with it. Mr. Reichle, as the individual who undoubtedly spent the most time with appellant, clearly was of the opinion that appellant was both competent to stand trial and represent himself. Further, based on the limited information that is in this record, Mr. Sisti's and Dr. Drukteinis's role in this case should be viewed with skepticism. Appellant's parents hired Mr. Sisti, prior to appellant's arrest, to represent him in New Hampshire. (4CT 864.) Also prior to his arrest, appellant "posted several writings on the Internet, using his legal name, regarding the death of Officer Mobilio and his justifications for the attack." (4CT 864.) After his arrest, Mr. Sisti, without appellant's consent and against his express instructions made, "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." (4CT 864-865.) In other words, even prior to his arrest appellant had confessed to Officer Mobilio's murder. After his arrest, an attorney, retained by appellant's parents, advanced mental health claims against appellant's instructions. Mr. Sisti retained Dr. Drukteinis, he was not appointed by any court. In sum, an attorney not of appellant's choosing, advanced a theory with which appellant did not agree, to attempt to avoid responsibility for a murder to which appellant had already confessed and was not trying to avoid responsibility. The simple fact is this: with the exception of disagreement with appellant's extreme and violent political views, there is no indication that appellant is remotely incompetent.

The A.B.A. Standards cited by appellant similarly do not advance his claim. (AOB 70.) As noted by appellant, A.B.A. Standards for Criminal Justice (1986) section 7-4.2, subdivision (c), 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 a good faith doubt of competence.

There is simply no indication in this record that Mr. Reichle ever had a "good faith doubt" as to appellant's competence. In fact, the opposite is true. In the November 20, 2003, pleading, in support of appellant's request for self-representation Mr. Reichle stated:

> 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 hearing on

that issue. [Citation omitted.] There is no such evidence in this case.

(3CT 743.)

As a consequence, rather than a "good faith doubt" as to appellant's competence, Mr. Reichle felt that appellant was competent to stand trial, and represent his own interests.

Similarly, the cases cited by appellant do not support his argument. (AOB 69.) To the contrary, the cases cited by appellant support the respondent's position that an ineffective assistance of counsel claim such as appellant's should only be considered in a habeas corpus proceeding.

Each of the federal cases cited by appellant: *Ford v. Bowersox* (8th Cir. 2001) 256 F.3d 783, 786; *Kibert v. Peyton* (4th Cir. 1967) 383 F.2d 566, 569; *Speedy v. Wyrich* (8th Cir. 1983) 702 F.2d 723, 726; and, *Loe v. United States* (E.D. Va. 1982) 545 F.Supp. 662, 666 (AOB 69) are all decided in the context of a habeas corpus proceeding.

Similarly, each of the state cases were in the context of a habeas proceeding, habeas proceeding consolidated with a direct appeal, personal restraint petition, or a direct appeal in which there had been an underlying post-conviction challenge and an accompanying hearing. For example, appellant relies on *State v. Johnson* (1986) 395 N.W.2d 176, as a case with "facts similar to the instant case" (AOB 70-72) in which the attorney was found deficient. In *Johnson*, the defendant was convicted of first degree murder. (*Id.* at p. 179.) Following his conviction the defendant brought a post-conviction motion claiming ineffective assistance of counsel. (*Ibid.*) Prior to trial, his attorney retained two mental health professionals to evaluate the defendant for a post-traumatic stress disorder defense. (*Ibid.*) After the examinations, his attorney decided not to pursue that defense and argue the intent element in that defendant was suffering from dissociative reaction and that he had acted in the heat of passion. (*Ibid.*)

The defendant and attorney had a disagreement concerning whether to request a lesser included offense instruction and the attorney requested the same two mental health professionals evaluate whether the defendant was competent to stand trial. (*State v. Johnson*, *supra*, 395 N.W.2d at p. 179.) The mental health professionals both expressed a concern about the defendant's competence to stand trial, but neither offered a conclusion as they both believed they had a conflict of interest because each were employed by the county forensic unit. (*Ibid.*)

At a subsequent hearing the defendant moved to substitute counsel, which was denied. (*State v. Johnson*, *supra*, 395 N.W.2d at p. 179.) The prosecution then raised a doubt as to the defendant's competency. (*Ibid.*) The defendant's attorney responded that neither he nor the defendant was raising "the competency issue." (*Ibid.*) Defendant's attorney, with knowledge of the letters from the mental health professionals he retained and asked to evaluate defendant's competency, indicated to the court that if any competency issues came up he would bring them to the court's attention. (*Ibid.*) After the hearing each of the mental health professionals sent another letter to defendant's attorney, but neither referenced their earlier concerns regarding competency. (*Id.* at pp. 179-180.)

At the defendant's post-conviction hearing on the claim of ineffective assistance of counsel, his attorney explained that he had been concerned about the defendant's mental condition and asked the mental health professionals to look at the competency issue. (*State v. Johnson*, *supra*, 395 N.W.2d at p. 180.) The attorney explained to the court that he felt it was his "strategic decision" not to raise the competency issue. (*Ibid.*) The attorney said at the hearing that one of his reasons for not raising the competency issue was that it was his interpretation of the Wisconsin statute that the defendant was competent, at least with respect to those areas that the attorney thought he needed to be competent. (*Ibid.*) The attorney

testified at the post-conviction hearing that he analyzed the competency issue in terms of what, if any, decisions the defendant's mental impairment would affect. (*Ibid.*) The attorney reasoned that if the mental impairment only affected those decisions which ultimately resided with counsel, the degree of impairment would have to be significantly greater for the defendant to be found incompetent as compared to situations where the impairment involves decisions the defendant controls. (*Ibid.*)

Thus, while this case was technically a direct appeal, as appellant notes (AOB 71), it is also true that there had been a post-conviction hearing in which the defendant's trial counsel testified and explained his reasoning. Further, it appears that the attorney in that case held a unique perspective as to when a potentially incompetent defendant could still be brought to trial. In California, procedurally, such a claim would be addressed in a habeas proceeding.

In re Fleming (2001) 16 P.3d 610, similarly fails to advance appellant's claim. (AOB 72.) In *Fleming*, the court accepted the defendant's guilty plea, imposed the sentence, and denied a motion to withdraw the plea. (*In re Fleming*, at pp. 613-614.) Following a direct appeal the defendant filed a personal restraint petition (PRP) alleging numerous issues, including that he was incompetent to plead guilty. (*Ibid.*)

In *Fleming*, the defendant's first attorney sought funds for a "psychological/mental health evaluation." (*In re Fleming*, *supra*, 16 P.3d at p. 612.) The court authorized an evaluation, which ultimately observed that the defendant was "psychotic at the time of" the crime and "marginally competent" to stand trial. (*Ibid.*) The defendant's first attorney withdrew and his second attorney moved for an order for mental health services at public expense. (*Ibid.*) That mental health professional concluded the defendant was:

> presently able to understand the nature and purpose of the proceedings taken against him, but is presently unable to cooperate in a rational manner with counsel in presenting a defense and is not able to prepare and conduct his own defense in a rational manner without counsel and therefore is judged presently mentally *incompetent to stand trial.*

(*In re Fleming*, at pp. 612-613, internal quotations omitted, emphasis in original.)

The Washington Supreme Court rejected defendant's claims that the court erred in failing to order a competency hearing (*In re Fleming*, *supra*, 16 P.3d at p. 615), but granted his claim of ineffective assistance of counsel. (*Id.* at pp. 616-617.) As relevant to the instant case, *Fleming* was not a direct appeal, but was a collateral attack in the form of a personal restraint petition. In sum, each of the cases cited by appellant support respondent's position that appellant's claim of ineffective assistance of counsel is more appropriately considered in a habeas corpus proceeding.

Nevertheless, even if considered in direct review, appellant's claim of ineffective assistance of counsel is without merit. Appellant contends that, "Nor could Reichle's failing have been the result of any tactical decision." (AOB 74.) Mr. Reichle clearly thought appellant was competent to stand trial and to represent his own interests. Mr. Reichle affirmatively informed the court that there was no substantial evidence of incompetence. (3CT 743.) Mr. Reichle's opinion is supported at the numerous places in the record in which appellant advocated on his own behalf. As stated several times, appellant presented as a logical, intelligent, and capable advocate. There was not even the slightest hint of being incompetent to stand trial and Mr. Reichle should not be faulted because he did not make this baseless observation.

Appellant also claims that, "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." (AOB 74.) There is no indication in the record that Mr. Reichle was "blindly" following appellant's instruction, and abdicating his professional responsibility. Mr. Reichle doubtless spent more time with appellant than anyone else involved in the case. Mr. Reichle was of the opinion that appellant was both competent to stand trial and competent to exercise his right to represent himself. Mr. Reichle was present during the relevant proceedings, knew of materials outside the record, and interacted with appellant, with the prosecutor, and with the judge. At no time did any of them question appellant's competency. Further, as has already been addressed, the letter from Dr. Drukteinis to appellant's New Hampshire counsel was certainly not substantial evidence of appellant's incompetence. And on this record it is not known what additional investigation or inquiry Mr. Reichle performed. Mr. Reichle's decision not to raise a doubt as to appellant's competency was in the broad range of acceptable professional standards.

Finally, appellant cannot establish any prejudice. Appellant advances a standard that he alleges applies when "defense counsel failed to obtain evidence."[15] (AOB 75.) But the standard for prejudice on claim of ineffective assistance of counsel is well settled. To meet the burden of demonstrating prejudice, appellant must show 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. [Citations.]" (*In re Harris*, *supra*, 5 Cal.4th at p. 833, internal quotations omitted.)

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[15] It is unclear if appellant argues that his attorney was ineffective for failing to obtain "evidence" or failing to present the "evidence" to the court. This solidifies respondent's position that this issue should be determined in the context of a habeas proceeding.

As demonstrated in Argument I(C) even if the Drukteinis letter had been presented to the court it does not present substantial evidence of appellant's incompetence, either to stand trial, or conduct his own defense. For example, the letter's ultimate conclusion is essentially that appellant's competency is "highly questionable" because he would refuse to plead insanity which provided the only "reasonable defense." In short, appellant may be insane because he refuses to say he is insane. As stated in the letter:

> 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.
>
> Again, these are preliminary findings that need to be assessed in light of all the discovery that becomes available and further personal interview and testing of Mr. McCrae.

(2Supp.CT 84.)

As has already been stated the letter, not presented under oath, or in response to the order of any court, is not sufficiently reliable to considered evidence of anything. Further, even if considered, Dr. Drukteinis's letter of preliminary findings is equivocal and conclusory. In sum, his preliminary opinion appears to be that appellant's competency is questionable because he refuses a plea of insanity, and that is his only available defense. The letter does not represent substantial evidence of appellant's incompetence. Further, as will be discussed in Argument IV and V, *post*, at all times, and in all court appearances, appellant presented as an intelligent, logical, and passionate advocate on his own behalf. Appellant cannot demonstrate there is a reasonable probability that had Mr. Reichle conveyed to the court the contents of the letter the outcome of the proceedings would have been different. Appellant's claim is without merit and should be rejected.

III. THERE WAS NO SUBSTANTIAL EVIDENCE RAISING A DOUBT AS TO APPELLANT'S COMPETENCY PRIOR TO JUDGMENT BEING PRONOUNCED

A. Introduction

Appellant contends that the trial court became aware of substantial evidence of appellant's incompetence prior to the judgment being pronounced, and erred in failing to suspend criminal proceedings. (AOB 80.) Appellant distinguishes this argument from Argument I as follows:

> 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.

(AOB 80.)

As discussed below, appellant's argument is essentially that events prior to the pronouncement of judgment, including, correspondence received from appellant's family and friends after the guilt and penalty verdicts had already been returned, incidents of appellant's alleged behavior in New Hampshire, and even appellant's political ideology, provided substantial evidence of appellant's incompetence. Appellant's claim is without merit and should be rejected. At all times during the proceedings, appellant presented as a logical, intelligent, and competent individual. Further, to the degree the contents of the correspondence from appellant's family and friends can be considered, they do not provide any evidence of appellant's current incompetence. There was no evidence of incompetence prior to the pronouncement of judgment.

B. Relevant Proceedings after the Verdicts Were Returned

On April 27, 2005, after the guilt and penalty verdicts had been returned, a hearing was held to address a number of issues, including an

automatic motion to modify pursuant to section 190.4. (10RT 2346.) The court denied the motion and filed a written statement of reasons. (13CT 3670-3673.) Thereafter, the court entered the judgment of death and commitment. (13CT 3674-3676.) Prior to these proceedings, family and friends of both the victim and appellant submitted written statements and correspondence to the court. (13CT 3627-3656, 3667-3668.)

C. Discussion

Appellant is critical of the court's procedure in addressing the automatic motion to modify, and claims the court erred in failing to suspend proceedings because it had been presented with substantial evidence of appellant's incompetence.

Appellant argues that:

> [T]he trial court conducted proceedings on the statutory automatic motion to modify the verdict of death. (Penal Code § 190.4, subd. (e).) Prior to that proceedings, 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 [] 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.)

(AOB 80-81.)

Here, the court followed the correct procedure, and properly denied the automatic motion to modify. In every case where a verdict of death is returned, a defendant is deemed to have made an application to modify the verdict. (*People v. Mungia* (2008) 44 Cal.4th 1101, 1139, citing § 190.4, subd. (e).) The trial court's function is not to make an independent and de novo determination, but rather to independently reweigh the evidence and determine whether, in the court's independent judgment, the weight of the evidence supports the jury's verdict. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1039; *People v. Jones* (1997) 15 Cal.4th 119, 190-191,

overruled on other grounds, *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

The ruling on a motion to modify must be based on evidence presented at trial. (*People v. Lewis* (2004) 33 Cal.4th 214, 230; *People v. Raley* (1992) 2 Cal.4th 870, 921 [trial court may not consider probation report]; *People v. Edwards* (1991) 54 Cal.3d 787, 847 [trial court correctly refused to consider defendant's new evidence not presented to penalty jury]; *People v. Cooper* (1991) 53 Cal.3d 771, 849 [trial court properly declined to hear from victims' relatives at modification hearing].) Thus, any criticism that the court in this case did not consider the correspondence from appellant's family and friends until after it addressed the automatic motion for modification is misplaced.

As noted above, appellant's claim is that the trial court became aware of "substantial evidence of appellant's incompetence prior to pronouncement of judgment," and erred in failing to suspend proceedings. (AOB 80.) The focus of this claim is the letters the court received from appellant's family members prior to pronouncing judgment, and that "Up until the time the court received those letters, the court did not have a complete picture of appellant's mental state."[16] (AOB 81.)

At the outset it should be noted that the correspondence and statements from appellant's family members are hearsay and are therefore inadmissible for purposes of establishing appellant's incompetence. (Evid. Code, § 1200). As summarized by this Court in *People v. Cudjo* (1993) 6 Cal.4th 585, 608, "Hearsay is generally excluded because the out-of-court declarant is not under oath and cannot be cross-examined to test perception,

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[16] This of course is inconsistent with appellant's claim in Argument I that the court should have suspended the proceedings at some point prior to or during trial.

memory, clarity of expression, and veracity, and because the jury (or other trier of fact) is unable to observe the declarant's demeanor." Further, "the various hearsay exceptions generally reflect situations in which circumstances affording some assurance of trustworthiness compensate for the absence of the oath, cross-examination, and jury observation." (*Ibid.*) The letters and statements were submitted to the court after appellant had been found guilty and the jury returned a penalty finding of death. The content of the letters and statements, to the degree they are considered at all, should be viewed with caution. There is no assurance of their trustworthiness to compensate for the absence of oath, cross-examination, and observation. Further, there is no applicable hearsay exception. Additionally, evidence regarding past events that do no more than form the basis for speculation regarding possible current incompetence is not sufficient. (*People v. Hayes* (2000) 21 Cal.4th 1211, 1280-1281.) As a consequence, to the extent the letters convey past events they are of little relevance to appellant's current competence.

For example, appellant's mother sent an e-mail to the court in which she reports that appellant had a difficult childbirth, and saw a counselor when he was four, and was medicated for depression for "much of his teenage years." (13CT 3634.) She also reported that two psychiatrists told her appellant suffered from "psychosis," and one report was "sealed by the court" and the other psychiatrist "needed more time" to determine the form of psychosis. (13CT 3634.) Appellant's mother concludes with the observation that, "My son has a mental illness," and indicating that his illness does not excuse what he did, but asks that he not be executed. (13CT 3635.) The e-mail from appellant's mother contains levels of hearsay, in which she conveys to the court what someone else told her, and as such is inadmissible and unreliable. Further, evidence of appellant's mental illness or bizarre statements is not enough to require a competency

hearing. (*People v. Laudermilk* (1967) 67 Cal.2d 272, 285.) It must be shown that the mental illness affected his ability to understand the proceedings or assist his attorney in his defense at the time of the proceedings. (*Koontz*, *supra*, 27 Cal.4th at p. 1064.) The communications from appellant's family and friends present no "substantial evidence" of appellant's mental competency at the time of trial.

Appellant does not refer to his father's e-mail. Appellant's father also mentions mental illness, but indicates there were no "overt symptoms." (13CT 3636.) He further states that in phone calls and letters from appellant, "there were no indications of the impending storm." (13CT 3636.) Appellant's father's e-mail makes no reference to psychiatrists or psychologist, or any diagnosis of mental illness. (13CT 3636.) Rather, the letter seems to indicate there were no signs of mental illness. (13CT 3636.) In fact, nothing in either letter from appellant's parents indicates that appellant was unable to understand the criminal proceedings or assist his attorney. The purpose of the communications from appellant's supporters was to garner leniency. As noted above, evidence regarding past events that do no more than form the basis for speculation regarding possible current incompetence is not sufficient. (*People v. Hayes*, *supra*, 21 Cal.4th at pp. 1280-1281.) Further, evidence of his mental illness or bizarre actions or statements is not enough to require a competency hearing. (*People v. Laudermilk*, *supra*, 67 Cal.2d at p. 285.) It must be shown that the mental illness affected his ability to understand the proceedings or assist his attorney in his defense at the time of the proceedings. (*Koontz*, *supra*, 27 Cal.4th at p. 1064.) Nothing in either of the communications from appellant's parents indicates that appellant was incompetent prior to or during trial or prior to the pronouncement of judgment.

Appellant's brother also submitted correspondence to the court and for the first and only time referred to possible auditory and visual hallucinations. As stated by appellant's brother:

> my brother called each member of our family shortly after he committed this terrible crime. During the conversation with my brother, he told me that he had met God and met the Devil, and that God 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.

(13CT 3637.)

None of these references pertain to appellant's competency at the time of trial or sentencing. Further, even assuming for sake of argument appellant called and made these statements to his brother, they are not enough to require a competency hearing. (*People v. Laudermilk*, *supra*, 67 Cal.2d at p. 285.) Nothing in appellant's brother's correspondence shows that appellant was not able to understand the proceedings or assist his attorney in his defense at the time of the proceedings. Further, there is nothing in the correspondence from appellant's brother that appellant was incompetent prior to the pronouncement of judgment.

Finally, the correspondence from friends and acquaintances to which appellant refers are of no import. (AOB 85.) There is no indication in any of these letters/e-mails that the individuals had any particular insight into appellant's mental state at the time of trial or prior to the pronouncement of judgment. In sum, the letters from appellant's family and friends, submitted to the court after the guilt and penalty verdicts had been returned, but prior to the court's pronouncement of judgment, are not substantial evidence of appellant's incompetence at any point in the proceedings.

Appellant also refers to a pleading filed by the prosecutor regarding appellant's conduct in New Hampshire. (AOB 82-83.) In briefing related

to the possibility of shackling appellant in court the prosecutor wrote in part:

> 5) Defendant was disruptive and uncooperative with jail authorities in New Hampshire refusing to dress; 6) Defendant demonstrated disrespect for the court process in New Hampshire appearing for court wrapped in a blanket....

(3CT 618.)

But as has already been well established, "more is required to raise a doubt than mere bizarre actions [citation] or bizarre statements...." (*People v. Laudermilk, supra*, 67 Cal.2d at p. 285.) These passing references to past incidents that may have occurred in New Hampshire have no bearing on a determination of appellant's competency prior to or during trial or prior to the pronouncement of judgment.

Appellant also points to pre-trial statements, trial strategy, and testimony in the penalty phase as additional evidence of incompetence. (AOB 83-84.) Not for the first time appellant's counsel uses disagreement with appellant's political ideology to bolster his claim for incompetence. But disagreement with appellant's violent agenda does not mean he is incompetent to stand trial or be sentenced. A defendant has the right not to present a defense and to take the stand and confess guilt and request imposition of the death penalty. (*People v. Clark* (1990) 50 Cal.3d 583, 617.) Further, there is no violation of public policy to allow a pro se defendant to refuse to introduce mitigating evidence. (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1062-1064, reversed & remanded on different grounds, *Stansbury v. California* (1994) 511 U.S. 318; *People v. Bradford* (1997) 15 Cal.4th 1229, 1371-1372; *People v. Bloom* (1989) 48 Cal.3d 1194, 1222-1224, revd. on other grounds *Bloom v. Calderon* (9th Cir. 1997) 132 F.3d 1267.)

Appellant had the right to represent himself and make tactical and trial strategy decisions. There is no indication that appellant, because of mental

illness, was incapable of understanding the purpose or nature of the proceedings against him.

Appellant argues that, "With the presentence report, the court learned that appellant had been found to suffer from psychosis by a second psychiatrist." (AOB 89.) As noted in previous arguments there is little indication in this record as to what was conveyed to the court regarding the New Hampshire proceedings and no indication that the court was ever presented Dr. Drukteinis's letter. Further, when appellant refers to the "presentence report" respondent assumes he is referring to the letter from appellant's mother and not the probation officer's report. The probation officer's report does not refer to a "second psychiatrist," but does state plainly:

> Concerning the defendant, he has no serious criminal history. Nothing in his background suggests a serious moral or emotional weakness of character. There is no indication of instability; he speaks with utter clarity about what he did and why. But two years after the crime he still has no remorse; he continues to believe he was right to murder a policeman, that it was a justified means of political expression.

(CT 3623.)

There is nothing in the probation officer's report about a second psychiatrist. Further, the correspondence from appellant's mother contains inadmissible hearsay that even if considered does not provide substantial evidence of appellant's incompetence. Appellant's claim that this matter must be remanded for a finding of competency to be sentenced is without merit and should be rejected.

IV. THE COURT PROPERLY GRANTED APPELLANT'S REQUEST TO REPRESENT HIMSELF

A. Summary of Argument

In this claim appellant contends that the court violated section 686.1, by granting appellant's request to represent himself without determining if he was competent to conduct his own defense. (AOB 92.) Specifically, that there must be a "minimal level of trial skill," and "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." (AOB 94.) Appellant's claim is without merit.

As will be discussed more fully below, criminal defendants have a Sixth Amendment right to represent themselves. Self-representation by defendants who wish it and validly waive counsel is the norm and may not be denied lightly. There is no indication in the record that appellant suffered from a mental illness that prevented him from carrying out the basic tasks needed to present a defense. In fact, a review of the record reveals that appellant was an intelligent, logical, and capable advocate on his own behalf. Appellant's claim is without merit and should be rejected.

B. Relevant Facts

From the outset of the proceedings appellant sought to represent himself. On January 30, 2003, at appellant's first appearance in California, appellant asked the court to recognize his right to represent himself. (IRT 5-6.) The court did not do so at that time and appointed the public defender to represent him. (IRT 6.) On April 7, 2003, Mr. Reichle, who had been appointed to represent appellant on appellant's behalf, filed a "Motion and Notice of Motion re Participation in the Proceedings." (3CT 561.) In that motion appellant's counsel stated:

> Defendant requested at his arraignment that he be allowed to represent himself as co-counsel with his appointed counsel in

order to assure his control of the proceedings. Defendant has undertaken extensive and diligent study to become more familiar with the criminal trial process.

Defendant, at his arraignment, agreed to defer a request for self-representation until after the preliminary examination. However, Defendant believes it is both necessary and appropriate that he be allowed to personally address the Court in order to explain the legal basis and nature of his affirmative defense. The articulation of his Constitutionally-based affirmative defense, at least at this stage of the case, is best provided by the person who researched and developed this claim, which is in some ways similar to the right to resist an unlawful arrest. See *e.g.* CALJIC 16.110; *People v .White* (1980) 101 CA3d 161; *People v. Curtis* (1969) 70 Cal 3d 347, 354-57.

What the Defendant proposes is that he be allowed to address the Court by way of extended offer of proof and/or argument as to legal sufficiency of his defense of justification by right to resist.

(3CT 562-563.)

On April 21, 2003, the People filed a response. (3CT 594.) On April 22, 2003, after hearing argument from the parties, the court denied appellant's request to participate in the proceedings. (3CT 621-622.)

Appellant persisted in seeking self-representation. On November 20, 2003, appellant, through Mr. Reichle, filed a motion, and supporting points and authorities, to represent himself. (3CT 738-746.) On November 24, 2003, appellant personally prepared and submitted, "Defendant's Own Points and Authorities In Support of His Right to Self-Representation."[17] (3CT 751-765.) As clarified by appellant in that pleading, he first expressed his intent to represent himself on January 30, 2003, at his initial appearance. (3CT 751.) On December 4, 2003, the People filed a response

[17] As discussed more fully in Argument VI, appellant made it clear in this document that he was aware this was a capital case.

to appellant's motion. (3CT 771-784.) On December 8, 2003, appellant completed and signed a *Faretta* waiver form. (3CT 788.)

On December 8, 2003, the court addressed appellant's motion and the following exchange occurred:

> [COURT]: The next issue is the Defendant's request for self-representation. Did he complete the waiver form?
>
> [MR. REICHLE]: I don't know, Your Honor. I didn't—I thought you had the Bailiff providing that to him.
>
> [COURT]: I thought that he did.
>
> [MR. REICHLE]: I did not go down and check on that. I probably should have.
>
> Oh, you did do this?
>
> Yes, I hadn't seen it, Your Honor. The Bailiff has just provided me a copy or an original waiver form, so I believe he has done so.
>
> [COURT]: [Appellant], did you read and understand this form?
>
> [APPELLANT]: I did, Your Honor.
>
> [COURT]: Do you have any questions about that form?
>
> [APPELLANT]: No, Your Honor.
>
> [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 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?

[APPELLANT]: Yes, I do.

[COURT]: Generally speaking, it is unwise for someone to represent themselves for a variety of reasons.

Do you understand that?

[APPELLANT]: Yes, I do, Your Honor.

[COURT]: Probably the first obvious one would be that the People are going to be represented by an 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?

[APPELLANT]: I understand that disadvantage, Your Honor.

[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 be 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?

[APPELLANT]: I do, Your Honor.

[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?

[APPELLANT]: I understand that, Your Honor.

[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?

[APPELLANT]: Understand that.

[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?

[APPELLANT]: I know that, Your Honor.

[COURT]: Sir, do you have any questions about your ability to represent yourself in the proceeding?

[APPELLANT]: No, Your Honor.

[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.

Mr. Cohen, did you wish to be heard?

[MR. COHEN]: Just briefly, Your Honor. Are you ready to take up the issue of assisting counsel status at this point in time?

[COURT]: Sure.

[MR. COHEN]: The People's position is pretty straightforward, as outlined in our memorandum of points and authorities in regard to Defendant's motion for self-representation.

Basically there are two points I would like to make, Judge. The first point being that although the Defendant has a constitutional right to represent himself, he does not have a right to appointment of advisory co-counsel or standby counsel in whatever fashion. The Judge, however, as the Supreme Court has stated, has discretion to appoint such counsel.

Our request is that if the Court were to exercise this discretion, as outlined in our motion, we would be asking that the Court appoint standby counsel, stand-by counsel in the form of counsel being able to assist the Defendant, if and when the need arise, due to a termination of self-representation. So in that instance, if the Defendant is representing himself and either the Court terminates his right to represent himself or Defendant elects to terminate his right to represent himself, then standby counsel could come in and replace the Defendant. That would be the preferred form we would ask for.

Standby counsel has been recognized by several courts. This is in the outline or in my memorandum of points and authorities.

And with that, I would submit it.

[COURT]: Mr. Atkins, on my desk is a yellow notepad. Would you get it for me? We will just take a moment. I will be with you in just a moment.

[MR. REICHLE]: He is requesting an adjustment on the chains with the Bailiff.

[COURT]: Okay.

(Brief pause.)

[COURT]: Mr. Reichle, did you wish to be heard on any issues?

[MR. REICHLE]: I am prepared to, Your Honor. But the Defendant is requesting that he be allowed to respond to the comments of the District Attorney.

[COURT]: Mr. Mickel, go ahead.

[APPELLANT]: Your Honor, I would simply respond to the points that I agree and disagree with the Prosecution on the points that they raised in their brief and that they reiterated just now.

The Prosecution prefers standby, that if Counsel be appointed in an assisting fashion, that it be under the label "standby counsel." That's fine with the defense. But I do have a disagreement with how the Prosecution interprets that standby counsel must be assigned.

The Prosecution wants standby counsel, and wants it to have no role in the presentation of the case unless and until Defendant's right of self-representation is terminated. And that if standby counsel is going to advise the Defendant during the trial, that it be outside the jury's presence. That counsel would not be permitted to present an opening statement, present evidence, cross-examine witnesses, refute evidence, present a closing argument, or perform any other attorney functions unless and until Defendant's self-representation is terminated.

The Prosecution wants to categorically silence standby counsel. But the cases that the Prosecution cites to support this categorical silencing of counsel expressly hold that standby counsel does not need to be categorically silenced.

The two cases that the Prosecution cites to support the categorical silencing of standby counsel are *McKask*[*le*] *v. Wiggins* and *People v. Gallego*.

In the *McKask*[*le*] *v. Wiggins*, the Court holds that the right to appear pro se exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may be the accused's best possible defense. Both of these objectives can be achieved without categorically silencing standby counsel.

And in *People v. Gallego*, referencing *McKask*[*le*] *v. Wiggins*, the Court brings up how, in *McKask*[*le*], the standby counsel examined witnesses and laid the foundation for the presentation of documents, and held that standby counsel's involvement in such basic mechanics was irreproachable.

So both of the cases that the Prosecution cites are directly adverse to what the Prosecution is arguing.

I simply ask, as was submitted in the proposed statement, that standby counsel or advisory counsel, whatever label counsel is assigned to assist me under, that they be permitted to interact in court proceedings when two conditions are met: when I request it, and when the Court allows it.

So in summation, Your Honor, I would simply ask that Mr. Reichle be appointed to assist me under the label of advisory counsel in order to advise me in the formation of my argument and my legal argument, and that he be allowed to participate in court when those two conditions are met: when I request it, and when the Court allows it.

And I recognize that once I assume self-representation that I have a responsibility to handle my case, and that I can't just frivolously constantly simply ask Mr. Reichle to jump in and take care of it for me. And I intend to handle every aspect of the case that I am capable of.

But I do believe that there—I certainly need Mr. Reichle's advice, and I believe that there may be instances where I will need his assistance in the courtroom.

And with that, I submit, Your Honor.

[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?

[APPELLANT]: So are you saying that he will not—Mr. Reichle will never be available to examine witnesses or to interact with the Court, Your Honor?

[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 allow Mr. Reichle to be an advisor for you. But an advisor 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 aspect 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.

[APPELLANT]: Right.

[COURT]: Understood?

[APPELLANT]: I agree with Your Honor, and I understand that.

[COURT]: And that is the responsibility that you want to take on?

[APPELLANT]: That's correct, Your Honor.

[COURT]: Okay. Anything further, sir?

[APPELLANT]: No, Your Honor.

[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 to 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.

In terms of assistance by counsel, first, the Court rejects any request, if that is even being made, for co-counsel. Co-counsel is more appropriate where it is the attorney who is permitting the Defendant to act as co-counsel, and the attorney remains primarily responsible for the presentation of the case.

It is the Court's impression—and I certainly would be corrected if I am wrong—that it is the Defendant who wants to be in charge of his case, and only seek the assistance of counsel. And absent some further showing, at least, of marked necessity, it would be inappropriate for the Court to appoint Mr. Reichle to somehow be co-counsel with the Defendant being in charge of the case itself.

Under *People v. Hamilton*, at 48 Cal.3d, 1142, the Supreme Court made it relatively clear that there are—that the Defendant has two rights, two constitutional rights: one is to represent himself, and the other is to be represented by counsel. And for the Court to at this juncture grant a request for co-counsel, it would be inconsistent with that directive, and there is insufficient evidence to support any exercise of discretion by the Court which would permit such a conclusion.

The other two possibilities are advisory counsel and standby counsel. The Court believes that it is appropriate that the Defendant be granted his request for advisory counsel, noting that advisory counsel is just that, an attorney who provides advice to the Defendant, but does not actively participate as counsel in the case, at least absent some further order by the Court based upon some showing that in a limited sense that would be appropriate.

One of the issues addressed by the Defendant is that he should remain doing more than 50 percent of the case. Well, recognize it is awfully difficult for the Court to somehow figure out what is more than 50 percent.

And it is necessary for the Court to clarify that if a defendant is representing himself, then, in fact, the Defendant is in charge of the case and bears the responsibility for conducting

a defense, and not an attorney who is placed in the situation that he is taking directions from someone far less experienced than himself and subjecting himself to orders from a defendant that may or may not be appropriate.

The Court will grant the request for advisory counsel. Counsel is to advise and assist the Defendant.

The Court retains authority to decide to what extent that advice and assistance will be given, and will, if appropriate, place some limitations on the type of activities that Counsel is expected to conduct in support of the Defendant, since his role is not to be a runner and not to be a law clerk, but to be an attorney/advisor, leaving to the Defendant the primary responsibility of conducting the defense.

Regarding standby counsel, it is a good possibility that this Court may include in the advisory capacity also the designation of standby counsel. But given our prior discussions that we are looking at September for a trial date, it is the Court's view that decision does not need to be made quite yet, and the Court needs probably a little more interaction with the Defendant to determine whether or not that is an appropriate order.

Therefore, the Court does not deny nor does it grant standby counsel at this time, but may very well do so sometime in the future, but far enough from the trial date so that it is an effective order.

Mr. Mickel, anything further that you wish to address at this time—

[APPELLANT]: No, Your Honor.

(IIRT 245-257.)

At all times prior to and during trial appellant presented as a logical, intelligent, and capable advocate. For example, on April 5, 2004, appellant demonstrated a sound grasp of court proceedings and procedure as demonstrated in the following exchange:

[COURT]: People vs. McCrae. The record shall reflect the Defendant is present. Advisory counsel is present. Mr. Cohen appears for the People.

Gentlemen, we put this matter on calendar really simply for review more than anything else. I don't have anything filed, so I don't know that there is anything that needs to be reviewed.

Mr. McCrae, is there any issues?

[APPELLANT]: There was one thing I wanted to address, Your Honor.

This case being a death penalty case, and myself acting as trial counsel personally, I reviewed transcripts for all the court appearances, and I have also received from Department 4 an order that I submit a declaration that all court appearances are accounted for. But also in the same declaration it says that if trial counsel is different than the counsel for the preliminary hearing, then the counsel for the preliminary hearing has to also submit the same type of declaration. And trial—counsel for preliminary hearing, now advisory counsel, has not received transcripts of the court appearances.

And I would like to request that the Court order that transcripts be provided to Mr. Reichle for two reasons: one being—

[COURT]: Sir, done. It is ordered. Okay.

And I think I am calling you McCrae. It is Mickel; is that correct?

[APPELLANT]: That's correct, Your Honor.

[COURT]: Thank you. I apologize. Anything further?

[APPELLANT]: That's it.

(IIRT 264-265.)

At a hearing on May 10, 2004, appellant again demonstrated the ability to understand court proceedings and procedure as demonstrated in the following exchange:

[COURT]: People v. Mickel. The Defendant is present, appearing in pro per. His advisory counsel is present. Mr. Cohen appears for the People.

Counsel, primarily—or Mr. Mickel and counsel, the matter is primarily on for review. Are there any issues that either of you believe the Court needs to address?

[APPELLANT]: I don't believe there is anything that needs to be addressed today. But there were—I worked up a list with Mr. Reichle of different motions and hearings that I think will be needed—will need to be addressed.

First of all, a majority of the issues that the Prosecution intends to address at trial I am simply willing to stipulate to as fact and to be true.

And second of all, during the discovery that I have been provided with, there is a lot of different reports and references to reports and references to evidence and things that are spread out between a number of different states. And what I need to do with that is I need to make up a list of a request of the different items, and I need to provide that to the Prosecution.

And then, Your Honor, you said that you were wondering or thinking about whether or not you were going to use jury questionnaires. And I don't know if you have decided upon that or not. But if we are going to do that, then obviously the defense and the Prosecution will have to submit different questions that we both feel are going to be appropriate or necessary, and then hold a hearing on that.

[COURT]: That was why I mentioned it.

[APPELLANT]: Right.

[COURT]: So you could start working towards that.

[APPELLANT]: And then a sub-issue on that point would be—I know that there is a little leeway in the system as to whether or not the judge conducts all of the questions during jury voir dire and whether or not they can ask questions. And I am interested in what procedure you prefer, Your Honor; whether or not it is just a given that you will be conducting the questions, or it's a given that the lawyer or the representatives will be involved, or how exactly that works.

[COURT]: There is a high probability that this judge or any judge will not do all of the voir dire; that you will have some opportunity to ask your own questions. The extent to which the Court allows that will in part be determined by whether we use jury questionnaires and how extensive those questionnaires are. But I think you can assume that you will have some opportunity to ask questions of potential jurors.

[APPELLANT]: Okay. And another issue is that I fully intend to testify at the trial. But representing myself it makes it a little more complicated. And I think it would be useful to have motions or a hearing and hash out whether or not, am I simply just going to testify in the narrative. Or I am aware that the Prosecution doesn't want Mr. Reichle to be involved in the case at all. So it seems that a narrative is about all there is because it would be pretty ridiculous for me to ask myself questions out loud and then to answer them. So—

[COURT]: I have never followed the procedure where you would ask yourself questions. But at least in a determination of how you are going to do it, at some point in the somewhat near future you need to decide what your proposal is, and then we can address that specific issue: whether you want to do it in the narrative, whether you want to ask yourself questions, whether you want Mr. Reichle to do an examination. And I will just entertain whatever request it is that you make, and hear from the people on the issue.

[APPELLANT]: And then there also needs to be a procedure initiated in terms of subpoenaing out-of-state witnesses, and funds to make that process performed or to do that process.

[COURT]: Well, there is a statutory process, and that is something that you have a right to do and have the Court pursue. Mr. Reichle can advise you on what that statutory process is.

[MR. REICHLE]: Might I comment briefly, Your Honor, just on the procedural aspect, since I had great familiarity with this a couple of years ago.

There is a requirement that a ticket and a check accompany that. And the question is simply working out how, if the Court signs a certificate, how those funds—because we know it is an

accounting process, not just you can write a check—how those funds are going to be made available if the Court determines that it will issue a certificate for an out-of-state subpoena. I think that is the crux, just an administrative piece.

[COURT]: I don't know exactly how we will do it, but we will figure it out.

[MR. REICHLE]: That is just to raise it.

[APPELLANT]: And then there may or may not be a need to be a hearing in limine to exclude evidence.

[COURT]: "Hearing in limine" ordinarily would mean right at or about the time of trial. Is that the kind of hearing you are talking about, or are you talking about something where we have a hearing before trial so that you know what the ruling is going to be before we actually try the case?

[APPELLANT]: I don't have any particular leaning either way. We can do it—I guess "in limine" was not the right term to use.

[COURT]: Well, it was close enough.

[APPELLANT]: Thank you. And then that's—those are about all the issues that I think would need to be addressed by the motions and hearings except for how exactly you, Your Honor, would want to conduct bench conferences. And then I expect that that addresses a different couple issues that the Prosecution would want to address. But I will let the prosecution address those.

[COURT]: I assume you mean bench conferences as in during trial, if there are issues that need to be addressed outside the presence of the jury?

[APPELLANT]: Right, Your Honor. But I am aware that everyone's concerned about court security. So that's why I bring it up like that.

[COURT]: Actually it is a good question, and I hadn't thought about how we are going to address those, either.

Mr. Cohen—wait. Mr. Mickel, there was one issue. You had indicated that there was some discovery issues, and you needed to make the request of the District Attorney's office on some specific things.

[APPELLANT]: That's right, Your Honor. So—

[COURT]: How long do you need to notify them in writing of what it is that you want?

[APPELLANT]: I believe that I could get it done in a month.

[COURT]: Mr. Cohen, I know that we are operating under somewhat of an ambiguity because you don't know what they are going to request. But I would assume, then, within a couple of weeks, you would know if you could get that to them or not; or if you have, that you have gotten it to him.

[MR. COHEN]: Yes, Your Honor.

[COURT]: Are there any issues that the People wanted to address?

[MR. COHEN]: The main issue at this point in time is venue, Judge. And the People realize that the Defendant has an opportunity to request a change of venue up till and perhaps even during jury selection. But a lot of the issues that have been identified by the Defendant today would concern the trial judge. And without knowing actually at this point in time if we will be here in Tehama County or if we will be elsewhere, it's difficult at this point in time to lay out all our motions.

[COURT]: Well, Mr. Mickel, if you wish to address the issue, do you know what you are going to do in terms of venue at this point?

[APPELLANT]: At this time I don't know, Your Honor. I don't have a knee-jerk reaction to change of venue. I believe that the community, the Red Bluff community does have a right to hear an explanation in their own community, and I am respectful of that. But I think, I feel that it is wise to listen to what the venue expert has to say about it before I make a certain —before I make a definitive decision about that.

(IIRT 269-274.)

On April 8, 2004, appellant filed a declaration. (4CT 817.) The declaration again demonstrates appellant's intelligence and ability to more than capably represent his own interests. The declaration stated as follows:

> I, the defendant in *pro per* declare as follows:
>
> 1. I have personally reviewed all court transcripts from January 30, 2003 through February 9, 2004 and have found all court appearances to have been accounted for and transcribed.
>
> 2. I have personally initiated communication with opposing counsel regarding transcription of other discussions.
>
> 3. Under my supervision, the court file and docket sheets have been examined and these records further reflect that no court appearance has escaped transcription, and the court file appears complete.
>
> I declare under penalty of perjury that the above is true and correct to the best of my information and belief.

(4CT 817-818.)

Appellant continued to demonstrate the ability to represent himself. At a hearing on June 28, 2004, he informed the court that he would be filing a motion to continue because he needed additional time to prepare for trial and a motion for a change of venue. (IIRT 278-281.) On July 12, 2004, the court granted appellant's request for a continuance. (IIRT 283-291.) On August 25, 2004, a hearing on the motion for change of venue was held. (IIRT 297.) At the hearing appellant conduct an extensive examination of the witness and advocated for a change of venue. (IIRT 299-383, 392-408.) Ultimately, the court granted appellant's motion for a change of venue. (IIRT 411.) Following a hearing the court ordered that the trial be held in Colusa County. (IIRT 454.)

At a subsequent hearing regarding the setting of a trial date appellant again demonstrated his ability to represent his own interests, logically

discussing with the court his need for additional time to review discovery and prepare his defense. (IIIRT 463-464.)

The court indicated that it felt appellant was effectively representing his own interests. For example, at one of the pre-trial proceedings the court stated:

> The, I went to CALJIC for example, just—the California jury instructions guide, just to look at defenses, because they talk about principal justifications. Mr. Mickel, as I've watched you, I've been extremely impressed with your level of competence in these proceedings. I know throughout the day you've been consulting with Mr. Reichle, but you're very articulate, you seem to know where you're going, you're very well prepared. And so, I'm presuming you know what you talking about.

(IIIRT 627.)

At another pretrial hearing the court again recognized appellant's ability, stating on the record, "I am still very impressed with your skill level, with the quality of your representation."

At a March 17, 2005 pretrial hearing, after thoroughly discussing the logistics as to how jury selection would proceed, the court again inquired as to appellant's desire to represent himself.

> [COURT]: [¶]
>
> So, Mr. Mickel, have I confused you or are we okay with the understanding of what is happening?
>
> [APPELLANT]: I have a general understanding and then I am going to pour over the transcript, your Honor.
>
> [COURT]: Can I try to explain anything more poorly for you?
>
> [APPELLANT]: No, I think I am going to get it pretty well.
>
> [COURT]: Okay. Still okay representing yourself?

[APPELLANT]: Oh, yah.

[COURT]: Okay. Do you understand the opening statement rules?

[APPELLANT]: I do.

[COURT]: Okay.

[MR. COHEN]: Judge, before we leave the record while we are talking about voir dire, I am not sure if Mr. Mickel is going to be posing any questions in regard to his potential defense during the voir dire and if so do we need to discuss that at this time?

[APPELLANT]: Well, I intend to stick with the questionnaire, that is my intention at this point.

[COURT]: If he tells us he intends to stick with that, if he asks other questions and they are objectionable, you object and I will rule.

Anything else?

[MR. COHEN]: No.

[APPELLANT]: No.

(VRT 1196-1197.)

These are just some of the examples in the record of appellant capably representing his own interests.

C. The Trial Court Properly Granted Appellant's Request to Represent Himself

Appellant contends that the court violated section 686.1 by permitting him to represent himself without determining if he was competent to conduct his own trial defense. (AOB 92.) Respondent disagrees. Appellant's waiver of the right to counsel was knowing and intelligent and the court properly recognized his right to represent himself.

Section 686.1 states:

> 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.

Section 686.1, *Godinez v. Moran* (1993) 509 U.S. 389, and *Indiana v. Edwards* (2008) 554 U.S. 164 (*Edwards*), serve as the foundation for appellant's argument:

> 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.

(AOB 93.)

In appellant's opinion, a defendant who wishes to represent himself/herself must have "a modicum" of trial skills, including, understanding the nature of the offense, the available pleas and defenses, and the possible punishments. (AOB 94.) Appellant's claim is without merit. As will be discussed more fully below there is simply no indication in the record that appellant suffered from a severe mental illness to the degree that he was unable to carry out the basic tasks needed to present a defense. Further, the record demonstrates that appellant was a more than capable advocate on his own behalf.

As this Court had made clear, the *Edwards* court specifically declined to overrule *Faretta v. California* (1975) 422 U.S. 806. (*People v. Johnson* (2012) 53 Cal.4th 519, 531 (*Johnson*).) A criminal defendant still has a constitutional right to represent himself if he "'knowingly and intelligently'" forgoes the traditional benefits associated with the right to counsel. (*Faretta v. California, supra*, 422 U.S. at pp. 819, 835.) Self-representation by defendants who wish it and validly waive the right to

counsel remains the norm. (*Johnson*, *supra*, 53 Cal.4th at p. 531.) "The test of a valid waiver of counsel is not whether specific warnings or advisements were given but 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." (*People v. Bloom*, *supra*, 48 Cal.3d at p. 1225, revd. on other grounds in *Bloom v. Calderon*, *supra*, 132 F.3d 1267.) Thus, *Faretta* does not require the court to specifically advise a defendant of the possible penal consequences of the charges against him. (*People v. Harbolt* (1988) 206 Cal.App.3d 140, 149-150 [court not required to inform defendant of the increased penal consequences of the amended information].) A defendant seeking to represent himself "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" (*Faretta v. California*, *supra*, 422 U.S. at p. 835.) On appeal, the burden is on the defendant to demonstrate that he did not knowingly waive his right to counsel. (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 547.) On appeal the entire record is examined to determine the validity of the defendant's waiver of the right to counsel. (*Koontz*, *supra*, 27 Cal.4th at p. 1070.) Despite appellant's protestations that self-representation should only be allowed when a defendant can meet the most stringent standard of proof permitted by the federal Constitution (AOB 93), *Faretta* is still the norm and the court here was obligated to honor appellant's request as long as the waiver of the right to counsel was knowing and intelligent.

This Court's decision in *People v. Taylor* (2009) 47 Cal.4th 850 (*Taylor*), a capital case, is instructive. In *Taylor*, the defendant was granted permission to represent himself. (*Id.* at p. 856.) On appeal the defendant asserted several arguments that he was mentally incompetent to conduct his own defense and should not have been permitted to do so. (*Ibid.*)

Appellant first claimed that defendants should be represented by counsel in all capital cases, or at a minimum, whenever the self-representing defendant's conduct in his or her trial renders it unfair. (*Id.* at p. 865.) This Court rejected defendant's claim stating:

> We addressed and rejected much the same set of claims in *People v. Blair* (2005) 36 Cal.4th 686, 736-740, 31 Cal.Rptr.3d 485, 115 P.3d 1145, and other cases. We have explained that the autonomy interest motivating the decision in *Faretta*—the principle that for the state to "force a lawyer on a defendant" would impinge on "'that respect for the individual which is the lifeblood of the law'" [Citation]—applies at a capital penalty trial as well as in a trial of guilt. [Citation.] This is true even when self-representation at the penalty phase permits the defendant to preclude any investigation and presentation of mitigating evidence. [Citations.] A defendant convicted of a capital crime may legitimately choose a strategy aimed at obtaining a sentence of death rather than one of life imprisonment without the possibility of parole, for some individuals may rationally prefer the former to the latter. [Citation.]

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

The Court then turned to what it described as "the more difficult question of whether self-representation should have been denied or revoked on the ground defendant was mentally incompetent to represent himself." (*Taylor*, *supra*, 47 Cal.4th at p. 866.) The Court considered the Supreme Court decision in *Edwards*, one of the cases that serves as the foundation of appellant's argument here. (*Ibid.*) As observed by this Court in *Taylor*, in *Edwards*, *supra*, 554 U.S. 164, the Supreme Court held the federal Constitution does not prohibit state courts from denying self-representation to defendants who are competent to stand trial with an attorney, but who lack the mental health or capacity to conduct their own defense at trial. (*Taylor*, at p. 866.)

In its analysis the Court considered California cases decided before the Supreme Court's decision in *Faretta*, and observed:

> Before *Faretta* then, we had referred to self-representation competence, but had not articulated any standard under California law for its assessment.

(*Taylor*, *supra*, 47 Cal.4th at p. 872, footnote omitted.)

The Court also noted that, "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." (*Taylor*, *supra*, 47 Cal.4th at p. 872) The Court cited *People v. Burnett* (1987) 188 Cal.App.3d 1314, which "expressed a contrasting view." (*Taylor*, at p. 873.) The Court then observed:

> The United States Supreme Court's 1993 decision addressing competence, *Godinez v. Moran*, *supra*, 509 U.S. 389, 113 S.Ct. 2680, 125 L.Ed.2d 321 (*Godinez*), appeared to resolve any dispute by denying the existence of a separate competence standard for self-representation as a matter of federal law.

(*Taylor*, *supra*, 47 Cal.4th at p. 874.)

The Court outlined the impact of the *Godinez* decision, noting, among others, its own decision in *People v. Halvorsen* (2007) 42 Cal.4th 379, in which:

> we held a trial court had erred in denying the defendant's motion to represent himself at a penalty retrial on the ground the defendant "lacked the mental capacity to represent himself...." Under *Godinez*, the *Faretta* right "may be asserted by any defendant competent to stand trial," making the trial court's use of a higher standard erroneous.

(*Taylor*, *supra*, 47 Cal.4th at p. 876, footnote omitted.)

The Court then addressed the Supreme Court's decision in *Indiana v. Edwards*, *supra*, 554 U.S. 164, and as relevant to appellant's case, determined that *Edwards* does not support a claim of federal constitutional error in a case in which defendant's request to represent himself was granted. (*Taylor*, *supra*, 47 Cal.4th at p. 878.) The Court summarized the *Edwards* ruling as follows:

> The court in *Edwards* did not hold, contra to *Godinez*, that due process mandates a higher standard of mental competence for self-representation than for trial with counsel. The *Edwards* court held only that states *may*, without running afoul of *Faretta*, impose a higher standard, a result at which *Godinez* had hinted by its reference to possibly "more elaborate" state standards. (*Godinez*, *supra*, 509 U.S. at p. 402, 113 S.Ct. 2680.)

(*Taylor*, at pp. 877-878, emphasis in original.)

As a consequence, consistent with this Court's analysis in *Taylor*, because the court here granted appellant's request to represent himself, there can be no federal constitutional error.

Further, at the time of appellant's trial, the *Dusky v. United States*, *supra*, 362 U.S. 402, standard of competence to stand trial was the only one to apply. The defendant in *Taylor* argued that the trial court, in considering his request to represent himself, should have exercised the discretion, later recognized in *Edwards*, to apply a higher standard than competence to stand trial. (*Taylor*, *supra*, 47 Cal.4th at p. 879.) The Court ruled:

> We reject the claim of error because, at the time of defendant's 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. (see *Dusky v. United States*, *supra*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824), under which defendant had already been found competent.

(*Taylor*, at p. 879.)

The Court held that that it was not error for the trial court, in the absence of a different California standard, to conclude that the finding that the defendant was competent to stand trial compelled a further finding that he was competent to represent himself. (*Taylor*, *supra*, 47 Cal.4th at p. 881.) The same is true here. Because there was no substantial evidence that appellant was incompetent to stand trial there was no justification to conclude that he was incompetent to represent himself.

This Court even more recently considered *Faretta* and *Edwards* in *Johnson*, *supra*, 53 Cal.4th 519. In *Johnson*, the defendant was originally represented by counsel, but the court subsequently granted his request to represent himself. (*Johnson*, at p. 523.) Approximately six months later, the court expressed a doubt as to appellant's competency to stand trial. (*Id.* at p. 524.) Criminal proceedings were suspended and a jury subsequently found defendant competent to stand trial. (*Id.* at p. 524.) Criminal proceedings were reinstated and defendant resumed representing himself. (*Ibid.*) Two days later, the court expressed concern about the defendant's ability to represent himself, telling the defendant, "You may be competent to stand trial, but I'm not convinced that you are competent to represent yourself." (*Id.* at p. 525.)

In *Johnson*, the Court summarized the difference between the issue before it, and the issue before the Court in *Taylor*, as follows:

> In *Taylor*, the trial court had *permitted* a defendant who was competent to stand trial and waive counsel to represent himself. Because the *Edwards* rule is permissive, not mandatory, we held that *Edwards* "does not support a claim of federal constitutional error in a case like the present one, in which defendant's request to represent himself was granted." (*Taylor*, *supra*, at p. 878, 102 Cal.Rptr.3d 852, 220 P.3d 872.) This case presents the reverse situation: the trial court denied self-representation under *Edwards*. We must decide whether California courts may accept *Edwards*'s invitation and deny self-representation to gray-area defendants.

(*Johnson*, *supra*, 53 Cal.4th at p. 527.)

The Court held that California courts may deny self-representation when *Edwards* permits, stating:

> Denying self-representation when *Edwards* permits does not violate the Sixth Amendment right of self-representation. Because California law provides *no* statutory or constitutional right of self-representation, such denial also does not violate a state right. Consistent with long-established California law, we

> hold that trial courts may deny self-representation in those cases where *Edwards* permits such denial.

(*Johnson*, *supra*, 53 Cal.4th at p. 528.)

The Court then considered the standard to apply when deciding whether to deny self-representation under *Edwards*. (*Johnson*, *supra*, 53 Cal.4th at p. 529.) The Court rejected the suggestions of the parties and amici curiae, including a suggestion to return to the pre-*Faretta* standard in California (*ibid.*), stating:

> All of these suggested standards are plausible. But we are constrained by the circumstance that what is permissible is only what *Edwards* permits, not what pre-*Faretta* California law permitted. In other words, because of federal constitutional constraints, in considering the defendant's mental state as a reason to deny self-representation, a California court may not exercise the discretion permitted under California law but solely that permitted in *Edwards*.

(*Johnson*, at p. 530.)

The standard announced by the Court is as follows:

> we believe the standard that trial courts considering exercising their discretion to deny self-representation should apply is simply whether the defendant suffers from a severe mental illness to the point where he or she cannot carry out the basic tasks needed to present the defense without the help of counsel.

(*Johnson*, *supra*, 53 Cal.4th at p. 530.)

The Court observed that a trial court only needs to consider the mental competence of a defendant seeking self-representation if it is considering denying self-representation due to doubts as to the defendant's mental competence. (*Johnson*, *supra*, 53 Cal.4th at p. 530.)

The Court reiterated that denying a defendant's Sixth Amendment right to represent himself/herself should not be done lightly, stating:

> Trial courts must apply this standard cautiously. The *Edwards* court specifically declined to overrule *Faretta*, *supra*, 422 U.S. 806, 95 S.Ct. 2525. (*Edwards*, *supra*, 554 U.S. at

> p. 178, 128 S.Ct. 2379.) Criminal defendants still generally have a Sixth Amendment right to represent themselves. Self-representation by defendants who wish it and validly waive counsel remains the norm and may not be denied lightly. A court may not deny self-representation merely because it believes the matter could be tried more efficiently, or even more fairly, with attorneys on both sides. Rather, it may deny self-representation only in those situations where *Edwards* permits it.

(*Johnson*, *supra*, 53 Cal.4th at p. 531.)

Here, the court only needed to consider appellant's competence if it was considering denying appellant's request due to doubts as to his mental competency. (*Johnson*, *supra*, 53 Cal.4th at p. 530.) But a court may deny self-representation based on a defendant's mental state only to the degree *Edwards* permits, not what pre-*Faretta* California law permitted. (*Ibid.*) The only way a court may deny self-representation because of a defendant's mental condition is if he/she suffers from a severe mental illness to the point where he/she cannot carry out the basic tasks needed to present a defense. (*Ibid.*) In this case, because the court granted appellant's request the only potential criticism is that the court abused its discretion because appellant had a "severe mental illness" to the degree he could not carry out the basic tasks needed to present a defense. Even a cursory review of this record reveals that was plainly not the case.

The law remains that a criminal defendant has the right to self-representation even though many may perceive that it is not in his/her best interest to do so. For example, a defendant's announced intention to seek the death penalty does not compel denial of motion for self-representation. (*People v. Bradford*, *supra*, 15 Cal.4th at pp. 1371-1372; *People v. Bloom*, *supra*, 48 Cal.3d at pp. 1222-1224, revd. on other grounds *Bloom v. Calderon*, *supra*, 132 F.3d 1267.) It is also true that a defendant has the right not to present a defense and to take the stand and confess guilt and

request imposition of the death penalty. (*People v. Clark*, *supra*, 50 Cal.3d at p. 617.)

Appellant's claim fails for several reasons. First, as in *Taylor*, at the time of defendant's trial, state law provided the trial court with no test of mental competency to apply other than the *Dusky* standard of competence to stand trial. (*Taylor*, *supra*, 47 Cal.4th at p. 879.) Second, *Edwards* does not support a claim of federal constitutional error in a case in which the defendant's request to represent himself was granted. (*Id.* at p. 878.) Further, to the degree appellant's claim is somehow the court abused its discretion in failing to deny self-representation, appellant certainly did not suffer from a severe mental illness to the point where he could not carry out the basic tasks needed to present a defense. (*Johnson*, *supra*, 53 Cal.4th at p. 530.)

There are many examples in this record of appellant more than capably representing his own interests. At his first court appearance on January 30, 2003, appellant asked the court to recognize his right to self-representation. (IRT 5-6.) On November 20, 2003, nearly 10 months later, appellant, through Mr. Reichle, filed a motion and supporting points and authorities still seeking to represent himself. (3CT 738-746.) In that motion appellant's counsel made clear to the court that appellant was aware of the challenges and disadvantages of representing himself, stating:

> 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. This 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.

(3CT 740.)

On November 24, 2003, appellant personally prepared and submitted, "Defendant's Own Points and Authorities In Support of His Right to Self-Representation." (3CT 751-765.) Appellant indicated to the court that he was aware of the applicable standard in determining if a defendant could represent himself/herself (3CT 752-753), and "unequivocally" asserted his "right to self-representation." (3CT 753.) Further, appellant stated:

> In this case the prosecution's case is relatively simple and straightforward, especially with Defendant willing to admit to 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 nearly all the evidence that Defendant intends to present, to a greater extent and diligence than the average defense would undergo.

(3CT 760.)

Appellant also completed a *Faretta* waiver form. (3CT 788.) Further, at the hearing, the court addressed appellant directly and they thoroughly discussed the disadvantages of self-representation. (IIRT 245-249.) The record as a whole demonstrates that appellant understood the disadvantages of self-representation, and the complexities of this particular case. Further, appellant was aware, since before he was granted the right to represent himself, that this was a capital case. And finally, at all times during the proceedings in which he acted as his own attorney, appellant presented as a capable, intelligent, and logical advocate. In sum, he was clearly able to carry out the "basic tasks" of presenting a defense without an attorney. Appellant's claim that he was incompetent to be granted the right to self-representation is without merit and should be rejected.

V. THE TRIAL COURT PROPERLY PERMITTED APPELLANT TO CONTINUE TO REPRESENT HIMSELF DURING THE PENALTY PHASE

A. Summary of Argument

In a closely related argument appellant contends that the failure to provide counsel at the penalty phase requires reversal of the judgment of death. (AOB 117-118.) Appellant distinguishes this argument from the one in section IV, *ante*, as follows:

> In the preceding argument, appellant has urged that *Indiana v. Edwards* permits the s[t]ate 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.

(AOB 117-118.)

Respondent disagrees. For all of the reasons stated in response to Argument IV, appellant's claim should be rejected. A defendant's right to self-representation continues through the penalty phase. At all times in the proceedings below appellant capably and intelligently represented himself, and advocated on his own behalf (Argument IV(B), Relevant Facts). Moreover, appellant presents no valid legal justification as to why one standard should apply in the guilt phase and then deny that defendant's right to self-representation at the penalty phase. There was simply no information or evidence before the court that would have justified revoking appellant's previously granted request to represent himself. His claim should be rejected.

B. The Trial Court Did Not Violate Section 686.1

Appellant argues that:

> In the instant case, the trial court violated the letter and 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.

(AOB 118.)

Specifically, appellant claims:

> 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.

(AOB 122.)

As appellant acknowledges this Court has previously rejected claims that the defendant's right to self representation may be limited at the penalty phase. (AOB 122, citing *People v. Blair* (2005) 36 Cal.4th 686, 736-740; *Koontz*, *supra*, 27 Cal.4th at pp. 1073-1074; *People v. Bradford*, *supra*, 15 Cal.4th at pp. 1364-1365; *People v. Clark*, *supra*, 50 Cal.3d at p. 617.) But it is appellant's position that because of *Edwards*, *supra*, 554 U.S. 164, these cases were "incorrect." (AOB 122.)

As discussed in Argument IV, this Court has held that California courts may deny self-representation only when *Edwards* permits. (*Johnson*, *supra*, 53 Cal.4th at p. 530.) Specifically, as stated by this Court:

> we are constrained by the circumstance that what is permissible is only what *Edwards* permits, not what pre-*Faretta* California law permitted. In other words, because of federal constitutional constraints, in considering the defendant's mental state as a reason to deny self-representation, a California court may not exercise the discretion permitted under California law but solely that permitted in *Edwards*.

(*Johnson*, *supra*, 53 Cal.4th at p. 530.)

Appellant's argument appears to be that a "state's interest in the integrity of a death judgment permits the state to limit that right [self-representation] at the penalty phase." (AOB 122.) But as this Court has already observed, "a California court may not exercise the discretion permitted under California law but solely that permitted under *Edwards*." (*Johnson*, *supra*, 53 Cal.4th at p. 530.) And *Edwards* only permits when a "defendant suffers from a severe mental illness to the point where he or she cannot carry out the basic tasks needed to present the defense without the help of counsel." (*Ibid.*) In considering the impact of *Edwards* this Court noted that, "Self-representation by defendants who wish it and validly waive counsel remains the norm and may not be denied lightly." (*Id.* at p. 531.)

As discussed thoroughly in the preceding argument appellant intelligently and capably represented his own interests and was well aware there would be a guilt and penalty phase in this capital trial. Prior to the court granting appellant's request to represent himself, his attorney filed a motion in support of his request and made it clear to the court that appellant was aware of the challenges and disadvantages of self-representation in a capital case. (3CT 740.) Appellant's counsel, under the heading, "Defendant's right to self-representation is in no way diminished by the fact that this is a capital case" stated:

> Although all capital cases are complex, the guilt phase here presents few factual or legal issues related to the People's case. The Defendant has repeatedly and publicly admitted the commission of the acts underlying this charge, choosing to rely on what is essentially an affirmative defense to defeat the charges. As to the penalty phase, Defendant understands that he will have wide latitude in presenting relevant mitigating evidence to convince the jury to not impose the death penalty, as well as the fact that there are limits on the Prosecution's right to introduce evidence in aggravation.

(3CT 742-743.)

Appellant personally prepared and submitted points and authorities in support of his request, which "unequivocally" asserted his "right to self-representation." (3CT 753.) Appellant also completed a *Faretta* waiver form, and at the hearing, the court addressed appellant directly and they thoroughly discussed the disadvantages of self-representation. (3CT 788; IIRT 245-249.) The record as a whole demonstrates that appellant understood the disadvantages of self-representation, and the complexities of this particular case. Further, appellant was aware, since before he was granted the right to represent himself, that this was a capital case. At all times during the proceedings in which he acted as his own attorney, appellant presented as a capable, intelligent, and logical advocate. Appellant affirmatively sought the right to represent himself, and did so capably at all times during the guilt phase of the trial. There was nothing in the record to justify the court revoking his right at the penalty phase. Appellant's claim is without merit and should be rejected.

C. Reversal of the Penalty Is Not Required

Appellant contends that, "The erroneous deprivation of the right to counsel under state law requires reversal without a showing of prejudice." (AOB 126.) But as outlined above appellant was not erroneously deprived of counsel. Rather, the court continued to honor appellant's recognized right to represent himself. Appellant's claim is without merit and should be rejected.

VI. THE COURT WAS NOT REQUIRED TO RECONSIDER GRANTING APPELLANT'S REQUEST TO REPRESENT HIMSELF AFTER THE PROSECUTOR ACKNOWLEDGED SECTION 190.3

A. Introduction

Appellant contends that the trial court failed to make the proper inquiry to ensure appellant knew this was a capital case when it granted his request to represent himself and as a result, the guilt and penalty verdicts

must be reversed. (AOB 127-128.)

In sum, appellant's contention is that, although all parties were keenly aware that this was a capital case, once the prosecutor acknowledged section 190.3, the court was again required to revisit appellant's desire to represent himself. The question actually presented by appellant here is whether or not his waiver of the right to counsel was knowing and intelligent with respect to the fact that he was potentially facing the death penalty. From the outset of these proceedings appellant sought to represent himself. The record further reveals that prior to the court's granting appellant's request to represent himself on December 8, 2003, all of the interested parties, and most importantly appellant, were aware that this was a capital case. A thorough review of the record also reveals that in the points and authorities written and filed by appellant on November 24, 2003, in support of his request for self-representation, he repeatedly demonstrated that he was aware that this was a capital case. Appellant's waiver of the right to counsel was knowing and intelligent, and as relevant to this claim made with the knowledge that this was a capital case. As a consequence, any claim that the court needed to obtain an updated waiver regarding appellant's desire to represent himself should be rejected.

B. Relevant Facts Related to Appellant's Knowledge That This Was a Capital Case

At the earliest stages of the proceedings both appellant and his attorney knew that this was a capital case. The preliminary hearing was on May 21, 2003, and appellant was held to answer. (3CT 672; IRT 222.) On May 29, 2003, an information was filed that charged appellant with one count of murder (§ 187, subd. (a)), and the special circumstance that the murder was committed while the victim was a peace officer engaged in the performance of his duties (§ 190.2, subd. (a)(7)). (3CT 685-686; 8CT

1858-1859.) The information specified that the sentencing range was life without parole or death. (3CT 686; 8CT 1859.)

On November 20, 2003, appointed counsel James Reichle filed points and authorities in support of appellant's request to represent himself. (3CT 738-746.) In that motion Mr. Reichle described appellant as "highly intelligent, literate and educated," and that appellant had undertaken an extensive study of criminal law and evidence. (3CT 739-740.)

Important to appellant's claim here, no fewer than three of the five headings in appellant's counsel's motion refer to this being at least potentially a capital case. (3CT 742, 744-745.) Appellant's counsel also noted that appellant was requesting the assistance of advisory counsel to conduct some parts of the defense and handle investigative duties and section 987.9 duties. (3CT 740.) Section 987.9 pertains to requesting funds in capital cases or in cases in which a person is convicted of second degree murder having served a prior prison term for murder.

Appellant's counsel also discussed the details of this specific case in the context of a capital proceeding. Importantly, appellant's counsel discussed appellant's knowledge of the phases in capital cases. As noted in the motion:

> Although all capital cases are complex, the guilt phase here presents few factual or legal issues related to the People's case. The Defendant has repeatedly and publicly admitted the commission of the acts underlying this charge, choosing to rely on what is essentially an affirmative defense to defeat the charges. As to the penalty phase, Defendant understands that he will have wide latitude in presenting mitigating evidence to convince the jury not to impose the death penalty, as well as the fact that there are limits on the Prosecution's right to introduce evidence in aggravation.

(3CT 742-743.)

In the motion Mr. Reichle make other references to this being a capital case (3CT 744-745), and in the conclusion states:

> Recognizing Defendant's right of self-representation now will avoid numerous difficulties in bringing this case to trial and serious appellate issues, especially since wrongful denial of the fundamental right of self representation requires a reversal of the conviction per se. Provided that Defendant is appointed qualified death penalty counsel serving as Advisory Counsel, the interests of both the Defendant, in presenting his own defense, and the People, in its obligation to insure an appropriate process in seeking the death penalty, will be served. This arrangement will greatly increase the probability that the orderly and expeditious conduct of the court's business will not be substantially hindered, hampered or delayed nor the finality of its judgment be subject to challenge on appeal. See[,] *e.g.*[,] *People v. Mattson* (1959) 51 Cal.2d 777, 797.

(3CT 746.)

On November 24, 2003, prior to the court granting appellant's request to represent himself, appellant wrote and filed a "Defendant's Own Points and Authorities In Support of His Right to Self-Representation." (3CT 751-765.) In that motion appellant not only demonstrated his ability to capably and competently represent himself, but also his knowledge that he was facing capital charges. (3CT 751.) Appellant reminded the court that from the beginning he wanted to exercise the right to represent himself. (3CT 751-752.) Appellant also advocated for the appointment of Mr. Reichle as "advisory counsel, standby counsel, or co-counsel or under whatever title the court deems appropriate..." (3CT 754), and in so doing states, "In capital cases the Court has the authority to appoint an additional attorney as co-counsel. P.C. 987(d)." (3CT 755.) Appellant further stated:

> In a death penalty case a trial court may be required to appoint a second attorney as co-counsel, if it appears that a second attorney may lend important assistance in preparing for trial or presenting the case. A defendant in a capital case represented by professional counsel, upon showing sufficient need, has a statutory right to the appointment of another attorney as co-counsel. P.C. 987(d).

(3CT 756.)

In noting the distinction between the appointment of additional counsel when one is represented by counsel versus when one represents his/her own interests, appellant stated:

> However, apparently a defendant representing himself in a death penalty case is not recognized to have this same right to the appointment of a second counsel. "Defendant, who has elected self-representation, was not entitled to appointment of a second attorney to assist him. Although in capital cases, an attorney may seek appointment of a second attorney to assist him, defendant was not an attorney." Scott v. Superior Court 212 Cal. App. 3d 505 (1989).
>
> However, this logic does not stand. The position of Scott, supra, hinges on a frivolous, out of context interpretation of the term "attorney." It is recognized in the legal system that a pro per defendant is "his own counsel," and "that he is acting as his own attorney." It is only logical and fundamentally fair that where a pro per defendant is held to all the same courtroom standards as a member of the bar, is afforded no special privileges, no extra time, and is in every way to be held to the same confining limitation as a trained attorney, the defendant must also be afforded all the same reasonable courtroom rights as a trained attorney as well, except in issues of security, or competency of counsel on appeal.

(3CT 757.)

Under a heading entitled, "**The complexity and uniqueness of the Defense case requires death-qualified counsel to be involved assisting Defendant**" (3CT 760), appellant stated:

> In this case the prosecution's case is relatively simply and straightforward, especially with Defendant willing to admit to 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.

(3CT 760.)

In the motion appellant continues to reference "death penalty" and "capital" case[s]. (3CT 761-762.) Appellant further bolstered his argument for the appointment of Mr. Reichle with the following observation regarding limited access to legal materials:

> Especially while attempting to prepare a defense in a capital case, such limited study would be a severe handicap to justice, where the defense receive no extra time to complete comprehensive legal study. It would substantially promote justice if Defendant were vicariously granted adequate access to case law and legal study, via Xeroxes, consultation, and the overall assistance of appointed assisting counsel.

(3CT 763.)

Finally, in support of his argument that Mr. Reichle specifically should be appointed to assist him, appellant acknowledged that, "An indigent defendant, even in a capital case, may not force a trial court to appoint a particular attorney." (3CT 764.)

Subsequently, on December 4, 2003, the People filed a response to appellant's motion for self representation, which contains numerous references to this being a capital case. (3CT 771-784.) In fact, the opening line of that document states, "Defendant has been charged with the commission of a capital offense namely, murder of a peace officer while engaged in the performance of his duties." (3CT 771.)

On December 8, 2003, appellant completed and signed a *Faretta* waiver form. (3CT 788.) On that same day the court held a hearing in which it granted appellant's request for self-representation. (IIRT 245-257.) As outlined in Argument IV(B), at the December 8, 2003, hearing, the court addressed appellant's request.

Approximately two months later, on February 9, 2004, the parties appeared in court and the following exchange occurred:

> [COURT]: People vs. Mickel. The record shall reflect the Defendant is present. Mr. Reichle is also present. Mr. Cohen appears for the People.
>
> Mr. Cohen, Mr. Mickel, this matter was just put on calendar for review, no particular reason other than to determine whether there were any problems or issues that the Court needed to address.
>
> Mr. Mickel, did you have any?
>
> [APPELLANT]: No, I don't have anything right now, Your Honor.
>
> [COURT]: Mr. Cohen?
>
> [MR. COHEN]: I would just like to state on the record that this will be a death penalty case. I have 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.
>
> I am aware of my 190.3 guidelines and requirements, and I will be filing at a later date to meet those guidelines.
>
> [COURT]: And I believe that the transcript has already been prepared from what used to be the Municipal Court. If not, it is directed that the transcript be prepared, and that it be approved by the Judge who heard the Preliminary Hearing.
>
> With that, Mr. Mickel, anything further?
>
> [APPELLANT]: No, Your Honor.

(IIRT 261-262.)

On February 4, 2005, the People filed a written notice of intention to introduce evidence in aggravation. (8CT 2007-2008.)

C. Legal Standard

It is appellant's contention that once the prosecutor provided notice pursuant to section 190.3, the court was again required to revisit appellant's

request to represent himself. (AOB 127.) As discussed in Arguments IV and V, a criminal defendant has the right under the Sixth Amendment of the United States Constitution to conduct his own defense if he knowingly and intelligently waives his Sixth Amendment right to the assistance of counsel. (*Faretta v. California*, *supra*, 422 U.S. at pp. 819, 835-836; *People v. Blair*, *supra*, 36 Cal.4th at p. 708.) The right to self-representation is not limited to the guilt phase of a capital trial, but extends to the penalty phase as well. (*People v. Clark*, *supra*, 50 Cal.3d at p. 617.) A defendant seeking to represent himself "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" (*Faretta*, at p. 835.) No particular form of words is required in admonishing a defendant who seeks to waive counsel and elect self-representation. (*People v. Blair*, *supra*, 36 Cal.4th at p. 708; *Koontz*, *supra*, 27 Cal.4th at p. 1070.) 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. (*People v. Blair*, *supra*, 36 Cal.4th at p. 708; *People v. Lawley*, *supra*, 27 Cal.4th at p. 140.)

Appellant's claim also appears to be based in part on the notice of evidence in aggravation. The purpose of a notice of evidence in aggravation "is to advise the accused of the evidence against him so that he may have a reasonable opportunity to prepare a defense at the penalty phase." (*People v. Wilson* (2005) 36 Cal.4th 309, 349, internal quotation marks & citations omitted.) There is no requirement that the notice be written. (*Ibid.*) Initially it should be noted that to the degree appellant's claim could somehow be interpreted as inadequate notice of intent to present evidence in aggravation, any such claim has been forfeited by appellant's failure to object. (*People v. Partida* (2005) 37 Cal.4th 428, 434-435; *People v. Farnam* (2002) 28 Cal.4th 107, 175.)

D. Appellant's Waiver of Counsel Was Knowing and Intelligent

As noted above, appellant contends that the court did not ensure that he waived his right to counsel with an understanding of the "ultimate penal consequences he actually ended up facing." (AOB 128.) Appellant's claim is without merit.

The record demonstrates that: prior to the court granting appellant's request to represent himself; and, prior to his completion of the *Faretta* waiver and the December 8, 2003, hearing; appellant was aware of the "ultimate penal consequences he actually ended up facing." His waiver of the right to counsel was therefore knowing and intelligent.

On November 20, 2003, appellant's attorney filed a motion in support of appellant's request to represent himself. (3CT 738.) That motion makes clear the interested parties, including appellant, knew that he was facing the death penalty. As just one example, in the motion appellant's attorney refers to the two phases of capital cases, and in specifically referring to the penalty phase, and appellant's knowledge of the penalty phase states:

> As to the penalty phase, Defendant understands that he will have wide latitude in presenting mitigating evidence to convince the jury not to impose the death penalty, as well as the fact that there are limits on the Prosecution's right to introduce evidence in aggravation.

(3CT 742-743.)

And perhaps even more telling of appellant's knowledge of the penal consequences of his murder of Officer Mobilio was the November 24, 2003, motion appellant wrote and filed in support of his request. In that motion, appellant advocates being permitted to represent himself, and for the appointment of Mr. Reichle to assist him. (3CT 751-766.) The motion makes numerous references to the "death penalty" and "capital" case[s].

Finally, on December 4, 2003, the People filed a response to appellant's motion for self representation, which contains numerous references to this being a capital case. (3CT 771-784.) In fact, the opening line of that document states, "Defendant has been charged with the commission of a capital offense namely, murder of a peace officer while engaged in the performance of his duties." (3CT 771.) A review of the record prior to the court granting appellant's request demonstrates that appellant was aware this was a capital case. Further, nothing that happened during the guilt phase of the trial would have justified revoking the court's previous grant of appellant's request.

Appellant acknowledges that generally a *Faretta* waiver remains in effect throughout the criminal proceedings (AOB 142), but claims that "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." (AOB 141.) There was no error. Appellant attempts to make much of the court appearance on February 9, 2004, wherein the prosecutor informed the court that, although he had let appellant's counsel know before, he was stating "on the record" that this was a death penalty case, and that he was aware of the 190.3 guidelines and requirements...." (IIRT 261.) This did not represent a "dramatic change" in the penal consequences.

As demonstrated in the record, appellant was well aware, prior to this date, and prior to the court granting appellant's request to represent himself, that this was a capital case and he therefore faced the death penalty. The record as a whole demonstrates that appellant understood the disadvantages of self-representation, including the risks and complexities of the particular case. (*People v. Blair*, *supra*, 36 Cal.4th at p. 708; *People v. Lawley*, *supra*,

27 Cal.4th at p. 140.) Appellant's waiver of the right to counsel was knowing and intelligent.

Appellant's also argues that once the People stated their intention to seek the death penalty, "the defendant must prepare for and face not one, but two inherently antagonistic trials: one on guilt and one on penalty." (AOB 144.) And that appellant did not appreciate the usefulness of counsel in that context. Appellant's position is not supported in the record. The record reveals that prior to the court granting appellant's request to represent himself he was aware that there were potentially two phases to the trial. As noted above, in the pleading filed in support of appellant's request to represent himself, his attorney specifically referred to the separate guilt and penalty phases and appellant's understanding of presenting mitigating evidence at the penalty phase to convince the jury not to impose the death penalty. (3CT 742-743.) Appellant knew that if found guilty of murdering Officer Mobilio there would then be a penalty trial in which he potentially faced the death penalty. As a consequence, an argument that appellant was somehow unaware that he potentially faced two phases at trial is not supported by the record.

Appellant also claims "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." (AOB 145.) As it must, appellant's argument presupposes that all of the interested parties were not already aware, prior to the People's announcement that they would comply with the section 190.3 statutory requirements, that this was a capital case.

First, as discussed above, the record reveals that appellant was well aware, prior to the court granting his request to represent himself, that this was a capital case and he therefore faced the death penalty. Second, the record contains numerous examples of appellant's impressive grasp of

procedural issues. For example, at a hearing just four months after being permitted to represent himself, and 11 months before the trial started, appellant demonstrated his impressive level of preparation and knowledge of the procedural aspects of a capital case:

> [APPELLANT]: There was one thing I wanted to address, Your Honor.
>
> This case being a death penalty case, and myself acting as trial counsel personally, I reviewed transcripts for all the court appearances, and I have also received from Department 4 an order that I submit a declaration that all court appearances are accounted for. But also in the same declaration it says that if trial counsel is different than the counsel for the preliminary hearing, then the counsel for the preliminary hearing has to also submit the same type of declaration. And trial—counsel for preliminary hearing, now advisory counsel, has not received transcripts of the court appearances.
>
> And I would like to request that the Court order that transcripts be provided to Mr. Reichle for two reasons: one being—
>
> [COURT]: Sir, done. It is ordered. Okay.

(IIRT 264.)

Appellant's argument that the procedural complexities of a capital case were somehow beyond his grasp is belied by the record. The above quoted language is just one of many examples in the record of appellant's impressive grasp of the law, both substantively and procedurally.

Further, appellant argues that, "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." (AOB 146.) But there was no error to "cure" and the court's exchange with appellant was not intended to "cure" an error that did not exist.

On January 19, 2005, in discussing the length of time the parties thought it would take to get a jury empanelled the following exchange occurred:

> [MR. REICHLE]: So I am allowing some extra time for sort of getting used to the process for the first part of the first day or so.
>
> [COURT]: Should I be readdressing the *Faretta* question?
>
> [APPELLANT]: No, Your Honor.
>
> [COURT]: Okay. I have reviewed the file that came to me fairly carefully regarding that question, and I think I'm comfortable with where we are. But the jury selection is a challenge. And I am not—as you have been told all along by judges before me, because I haven't told you much of anything, I can't tell you how to do it, and I can't help you do it. You are on your own with the assistance of advisory counsel. He can be at counsel table with you. That is okay with me.
>
> [APPELLANT]: I understand that, Your Honor. I have fully understood the depths in which I have thrust myself into. And I understand it is wholly my responsibility, and it is a large task, and that I have 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 of the difficulties that will be involved.
>
> [COURT]: Okay. For now I am okay. We might talk about that some more. But I just want to make sure that your issues are properly presented in court for your own sake.
>
> [¶]...[¶].

(IIIRT 515-516.)

The court's exchange with appellant was intended to reaffirm that the court and appellant remained comfortable with appellant's decision to represent himself. Additionally, it further demonstrated appellant's knowledge and sophistication, and that his prior waiver was knowing and intelligent. Appellant advances "reasons" the "error was not cured...."

(AOB 146.) But as discussed above, there was no error to "cure" and appellant's "reasons" do not support his claim. Appellant had the right under the Sixth Amendment of the United States Constitution to conduct his own defense if he knowingly and intelligently waived the right to the assistance of counsel. (*Faretta v. California*, *supra*, 422 U.S. at pp. 819, 835-836; *People v. Blair*, *supra*, 36 Cal.4th at p. 708.) That right extends to the penalty phase. (*People v. Clark*, *supra*, 50 Cal.3d at p. 617.) 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. (*People v. Blair*, *supra*, 36 Cal.4th at p. 708; *People v. Lawley*, *supra*, 27 Cal.4th at p. 140.)

Here, the record as a whole demonstrated that appellant was well aware, prior to the court granting his request that he represent himself, that this was a capital case, and he therefore faced the death penalty. Any claim that appellant only became aware this was a capital case after he was granted the right to represent himself is belied by the record. Appellant's claim is without merit and should be rejected.

VII. THE COURT DID NOT FAIL TO ADEQUATELY VOIR DIRE AND THEN REMOVE ANY JURORS

A. Summary of Argument

Appellant contends that three seated jurors and one alternate should have been removed. (AOB 151.) As stated by appellant, his contention is that:

> 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.

(AOB 151.)

As a result of this alleged error appellant claims the judgment of death must be reversed. (AOB 177.) Appellant's claim ultimately focuses on Jurors 7877, 7017, 10155, and 9466. (AOB 168.) Initially, any alleged error is forfeited because appellant did not challenge any of these jurors for cause, did not exercise a peremptory challenge to excuse any of these jurors, and accepted the jury as constituted. Further, the trial court had no *sua sponte* duty to excuse any of the jurors and appellant's trial rights were not violated because he had the opportunity to have the juror excused. Finally, when the entire voir dire is considered each of these jurors was capable of performing his/her duties in accordance with the instructions and his/her oath.

B. Relevant Facts

1. Facts pertaining to jury voir dire

On March 17, 2005, appellant filed a brief regarding the scope of voir dire. (9CT 2171.) Appellant's brief is telling in that it not only is indicative of appellant's grasp of the legal issues, but also because it is directed at a defendant's "right to question potential jurors on facts or circumstances likely to be presented in the case." (9CT 2171.) In fact, the conclusion of appellant's brief specifically refers to Question 39(d), the question which he now attempts to use as the basis for this challenge (AOB 151), stating:

> The Defendant has 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 and on any other general fact or circumstance likely to be a significant factor in this case.

(9CT 2174.)

Prior to voir dire the court and the parties discussed the manner in which questioning of the jurors would be handled. In that exchange the parties discussed the scope of questioning, at one point specifically considering Question 39(d).

> [COURT]: I ask the six. As I understand the law, those are the six questions I have to ask.
>
> [MR. COHEN]: If you are referring to the ones that I think you are, I agree with you.
>
> [COURT]: Well, let me see if I can find them and I'll tell you.
>
> Okay. The voir dire I think I have to ask:
>
> 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.
>
> 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.
>
> 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.
>
> 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. I think those are the six I am going to ask them and I'll ask them of the 18. We are going to use the six pack, did I tell you that?

[MR. COHEN]: Yes.

[COURT]: I will ask the 18 in the box that question and for each question I'll ask for everyone to respond by raising their hand and I'll try to get, to make sure you all know their feelings on these questions.

[MR. POYNER]: You will explore their answers?

[COURT]: I will explore their answers.

So, in fact, for these questions I will ask each one of them, I will ask the question and say "Juror Number One" and go right down the 18 and answer "yes" or "no" or whatever.

[MR. COHEN]: That would be great. And we are satisfied with the way the Court is approaching it. That is fine.

[COURT]: Mr. Mickel.

[DEFENDANT]: I agree, that sounds appropriate.

[COURT]: And I am sure you folks will read those questionnaires very carefully. I hope I do too, but you are free to inquire into those areas as well on the death penalty portion of this. If there is something in there that you feel is inconsistent and might raise to challenge in light of what the law is—and you briefed that Mr. Mickel, so you know. Then we'll consider those issues. And then we get past death penalty and we go into traditional voir dire.

[MR. REICHLE]: So the first phase is simply death qualification and that would be the scope as to the questionnaire. Not prolonged portion of that, just the death penalty.

[COURT]: Death qualify them and then we'll go to general voir dire.

[APPELLANT]: And how much of that do you intend to handle yourself, your Honor?

[COURT]: Well, that is a good question, because in this case we have got that questionnaire that is fairly thorough. Most of those things on the questionnaire in a traditional jury trial I ask and I explore those areas myself. Now I have already asked

them via the questionnaire. So how do you want me to do that? What do you think I should be doing? I am going to do the death penalty qualifying and what I saw happening after that would be that if there were issues on individual juror's questionnaire as I looked at it and I felt it should be explored I explored those areas. Otherwise, I probably wouldn't go through all of those questions again, because they have been asked.

[APPELLANT]: I think that would probably be all right. I think that Mr. Cohen and I will probably hone in on the specific areas that we are interested in and that would probably take care of it.

[MR. COHEN]: (nods head) That sounds fine.

[MR. REICHLE]: If I might, the converse of the question is: Do you have any particular limits other than redundancy or wasting time in terms of counsel's exploration, because there are, as you will see in the brief, one particular question mentioned there that is asked in general, "Should the state always," and I think the appropriate question would be "Would you always," to personalize that question. And there are several questions like that that are related to the questionnaires. Are you considering that for counsel?

[COURT]: I don't have a problem with that. The only request I would make is that if we can ask those questions to the panel and ask them to respond with a raise of the hand if their answer would be anything other than the appropriate response. Did that make sense?

(Reporter interrupts)

Raise their hand and say, for example—What is your question that you are referring to, counsel.

[MR. REICHLE]: It is 39D where it says, "Do you believe the state should automatically require the death penalty in all of the following," and there is four, the last line being, "When a police officer is the victim." "Do you believe the State should make that a mandatory death penalty situation?" So I assume the question would be something to the effect, you know, "You were asked if the State would do that. Would you personally,

automatically vote for the death penalty any time there is a police officer killed."

[COURT]: Okay. And you can 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. Is that going to be a problem?

[APPELLANT]: Well, in one manner, your Honor, I think you were—at first you were talking about asking them all and having them raise their hand and then you were saying that you were going to address them specifically. It seems—address each —question each juror specifically. It seems to me that when you ask them all and like have them raise their hand like the responsibility for answering is kind of diffused and like each person can kind of like feel like they don't really have to respond as—they don't feel that responsibility to respond as they would if you were actually addressing them specifically and asking them to vocally respond. So I am a little concerned about that.

[COURT]: Okay. That is a fair concern. However, my experience has been that if I ask jurors a question I get a whole lot of hands if they want to respond. So if there is certain areas that you feel it necessary to explore personally with each juror, tell me where they are and if we have a meeting of the minds on what those areas are that you want to explore with each juror, "Do you think this?" "Yes" or "no"? I would consider that.

[APPELLANT]: Okay.

[COURT]: But to conduct the entire voir dire of everybody in the box at one time, that is not going to happen.

[APPELLANT]: Okay.

[MR. POYNER]: If we have some questions of an individual juror based on the questionnaire.

[COURT]: You ask them.

[MR. POYNER]: Or do you want us to say, "Judge, look at answer 15."

[COURT]: I would be happy to do that too. I will do it either way you want.

[MR. POYNER]: Okay.

[COURT]: If you want me to explore those issues with the jury instead of you doing it, just tell me which areas you want me to explore and I will do that too.

[APPELLANT]: Okay.

[COURT]: See, my normal practices would be all of those questions that are on the questionnaire, pretty much all of those except the death penalty stuff in one form or another I cover and I ask the jury to discuss those things with me, "If you have these kind of feelings, if you do, raise your hand." And we talk about those things. And while Mr. Mickel makes a point, I just think that based on my experience, jurors around here are pretty candid, you ask them a question and they respond.

[APPELLANT]: Okay.

[MR. POYNER]: It seems jurors around here don't respond when you ask them to verbalize, they are more comfortable raising their hand.

[COURT]: So—

[APPELLANT]: Okay.

[COURT]: If you have areas of the questionnaire after you have reviewed it that you want me to consider, make a note of those and say, "Judge, please explore these areas." If you want to do it by juror it is because we have a whole lot of bodies to do that with. But if you had your notes and you want me to inquire into those areas, I will do that for you if you tell me what you want me to do. I don't know logistically quite how to make that work right. I will ask any questions that are fair and appropriate to ask if you want me to as opposed to you doing it to avoid the possible embarrassment that could come from asking a very sensitive question, I will bear the brunt of that issue.

But I expect you to be able to inquire into sensitive areas with individual jurors. I don't expect that we are going to do the

entire voir dire one on one with this panel. Did that give you any help?

[APPELLANT]: I understood the—I understand that you are not going to be doing one on one questioning, but Mr. Cohen and I will be doing one on one; is that right?

[COURT]: No. What I think is you are going to be under the same rules that I am.

[APPELLANT]: Okay.

[COURT]: If you believe that a juror needs to respond to something based on their questionnaire, you ask them. If you ask one of your questions that is the corollary to one of the questions that is on the questionnaire, I would expect that you would ask the jury to indicate if they—ask them for an answer so they can respond by raising their hand it if calls for a further response. So to use that scenario, "Do you always—would you always vote for death if an officer was killed? If you would, raise your hand." Then you know and you can talk to them.

[APPELLANT]: (nods head)

[COURT]: I think that was the example. And if they don't raise their hand then they don't think that.

[APPELLANT]: But then with specific individual responses then I can go into the individual juror.

[COURT]: Absolutely. Absolutely. If I misled you there, I didn't make myself clear. If Juror Cohen responds to question number 32 and says something, you can talk to that juror about that question. But I don't want you to talk to that juror about all 27 pages of questions.

[APPELLANT]: Oh, okay. And I understood that to begin with.

[COURT]: So specifically based on focused areas of inquiry.

[APPELLANT]: Right.

[COURT]: Should I make that clearer somehow?

[MR. COHEN]: I think I understand, judge.

[MR. REICHLE]: You are saying basically that if you're questioning about what is in the questionnaire and what it means or what it implies, then you are talking to the individual juror because they wrote the questionnaire. If you are raising a corollary or a new pertinent point that isn't covered by the questionnaire you want a, in bank, hands raised response before going to the individual jurors, "Do any of you feel X?" And then you would do that as a bank and then you would go into it, because then it is a general question not a specific interpretation of the questionnaire response.

[COURT]: Correct.

[MR. REICHLE]: Is that what you are saying?

[COURT]: Exactly. Excellent explanation. I wish I could have been that articulate.

(VRT 1182-1190.)

The parties continued to discuss the process as to how jury selection would proceed. (VRT 1190-1196.)

2. Facts pertaining to Juror Number 7877

Juror Number 7877 filled out the juror questionnaire. By way of background Juror Number 7877 had strong feelings on an individual's right to own guns, stating, "Every law abiding citizen should own guns." (37CT 10719.) Juror Number 7877 also indicated he/she had been in the NRA. (37CT 10719.)

The initial portion of Question 39 states, "Do you feel that the State of California should *automatically put to death* everyone who: ...." (37CT 10721.) Juror 7877 responded in the negative that the state should automatically put to death everyone who, "Kills another human being?" (37CT 10721.) But Juror Number 7877 answered in the affirmative for, "Is convicted of murder?" and "Is convicted of multiple murder?" (37CT 10721.) Juror Number 7877 also responded in the affirmative for, "Is

convicted of murder plus the murder was of a peace officer while the peace officer was engaged in the performance of his duties?" (37CT 10721.)

In response to Question 43 Juror Number 7877 indicated that he believed that life in prison without the possibility of parole was worse for a defendant than death. (37CT 10722.) Question 49 asked:

> The murder alleged in this case alleges the special circumstances that David Mobilio was a peace 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:

(37CT 10723)

Juror Number 7877 responded in the affirmative to both inquiries, "*you could impose the death penalty* in such a case?" and "*you could impose life in prison without the possibility of parole* in such a case?" (37CT 10723.) Juror Number 7877 also responded in the affirmative when asked:

> 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?

(37CT 10723.)

The court specifically questioned Juror Number 7877 regarding his/her views on the death penalty.

> [COURT]: Do you hold strong views in support of or in opposition to the death penalty as a punishment for murder?
>
> [JUROR NUMBER 7877]: Yes.
>
> [COURT]: Do you have an open mind on the death penalty determination?
>
> [JUROR NUMBER 7877]: Yes.

[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?

[JUROR NUMBER 7877]: Yes.

[COURT]: Imprisonment for life without parole?

[JUROR NUMBER 7877]: Yes.

[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?

[JUROR NUMBER 7877]: No.

[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?

[JUROR NUMBER 7877]: No.

[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?

[JUROR NUMBER 7877]: No.

[COURT]: Thank you, [Redacted Juror Number 7877].

(VIRT 1244-1245.)

3. Facts pertaining to Juror Number 7017

Juror Number 7017 filled out the questionnaire as well. (38CT 10940.) Juror Number 7017 indicated that he/she had been a member of the NRA, but was not any longer. (38CT 10938.) Juror Number 7017 responded in the affirmative when asked if the State should automatically put to death everyone convicted of murder, multiple murders, and murder of a peace officer while the peace officer was engaged in the performance of his duties. (38CT 10940.) Juror Number 7017 also indicated that he

could impose the death penalty and could impose life in prison without the possibility of parole where the allegation is that Officer Mobilio was a peace officer who was intentionally killed while engaged in the performance of his duties. (38CT 10942.) In response to Question 55, Juror Number 7017 indicated that he/she "strongly agreed" that anyone who intentionally killed another person should always get the death penalty. (38CT 10943.)

The court specifically questions Juror Number 7017 regarding his/her views on the death penalty.

> [COURT]: Do you hold strong views in support of or in opposition to the death penalty as a punishment for murder?
>
> [JUROR NUMBER 7017]: I think life in prison without parole and death penalty is one and the same. We don't kill anybody anymore.
>
> [COURT]: Okay. Do you have an open mind on the death penalty determination?
>
> [JUROR NUMBER 7017]: Yes.
>
> [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?
>
> [JUROR NUMBER 7017]: Yes.
>
> [COURT]: Imprisonment for life without parole?
>
> [JUROR NUMBER 7017]: Yes.
>
> [COURT]: Would you automatically vote for the death penalty in every case of murder in the first degree, no matter what the evidence may be?
>
> [JUROR NUMBER 7017]: The word "automatically" is the one that makes it a no.

[COURT]: Okay. Would you automatically vote against the death penalty in every case of murder in the first degree, no matter what the evidence may be?

[JUROR NUMBER 7017]: No.

[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?

[JUROR NUMBER 7017]: I will follow the rules.

[COURT]: Thank you, [Redacted Number Juror 7017].

(VIRT 1250-1251.)

4. Facts pertaining to Juror Number 10155

Juror Number 10155 filled out the questionnaire as well. (38CT 11065.) Juror Number 10155 indicated he/she had strong feelings about the private ownership of guns stating, "Ev[e]ryone has right to bear arms." (38CT 11077.) Juror Number 10155 did respond in the affirmative that the State should automatically put to death everyone who is convicted of multiple murder, and convicted of murder of a police officer in the performance of his/her duties. (38CT 11079.) In response to Question 49, Juror Number 10155 said he/she could impose the death penalty or life in prison without parole when asked if the murder alleged was that Officer Mobilio was a peace officer engaged in the performance of his duties, depending on the circumstance and evidence presented in the penalty phase. (38CT 11081.) Juror Number 10155 also indicated that given the two punishment options he/she could see himself/herself in the appropriate case, rejecting the death penalty and choosing life imprisonment without the possibility of parole, or the other way around. (38CT 11081.)

Juror Number 10155 indicated that he "Agree[d] somewhat" with the statement, "Anyone who intentionally kills another person should always

get the death penalty." (38CT 11082.) Juror Number 10155 explained that there might be circumstances where you would not give the death penalty. (38CT 11082.) He/she also indicated that he had worked closely with law enforcement, and anyone who intentionally killed an on duty officer deserved the death penalty. (38CT 11084.)

The court specifically questioned Juror Number 10155 regarding his/her views on the death penalty.

> [COURT]: Thank you, [Redacted Juror Number 10687]. And [Redacted Juror 10155], do you hold strong views in support of or in opposition to the death penalty as a punishment for murder?
>
> [JUROR NUMBER 10155]: Yes, I do.
>
> [COURT]: Do you have an open mind on the death penalty determination?
>
> [JUROR NUMBER 10155]: Yes.
>
> [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?
>
> [JUROR NUMBER 10155]: Absolutely, yes.
>
> [COURT]: Imprisonment for life without parole?
>
> [JUROR NUMBER 10155]: Yes.
>
> [COURT]: Would you automatically vote for the death penalty in every case of murder in the first degree, no matter what the evidence may be?
>
> [JUROR NUMBER 10155]: No.
>
> [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?
>
> [JUROR NUMBER 10155]: No.

[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 a possible death penalty?

[JUROR NUMBER 10155]: No.

(VIRT 1273-1274.)

5. Questioning of the jury panel as constituted

The court invited the parties to question the 18 jurors that were prospective panelists at that time, including Juror Numbers 7877, 7017, 10155. (VIRT 1277.) Juror Number 10155, as well as other jurors, were questioned by the prosecutor. (VIRT 1283.) The prosecutor asked multiple questions including clarifying some responses from the questionnaire. (VIRT 1277-1288.)

Appellant then had the opportunity to question the 18 prospective jurors. (VIRT 1288.) Appellant questioned one of the jurors about his/her job with the probation department affecting her/her impartiality. (VIRT 1289.) Appellant also had the following exchange with one of the jurors:

[APPELLANT]: And, [Juror V.]?

[JUROR V.]: Yes.

[APPELLANT]: In your questionnaire you said under the death penalty that on the portion of the questionnaire that was concerning the death penalty questions there is a question that asks, "Do you feel that the State of California should automatically be put to death everyone who is convicted of murdering a peace officer who was engaged in the performance of their duties?" And you said, "Yes, the state should automatically put those people to death." Could you explain to me why you marked "yes" for that?

[JUROR V.]: Because they killed a police officer. He is there to uphold the law and take care of us and everything.

[APPELLANT]: So is it your feeling that anyone who kills a police officer should automatically die?

[JUROR V.]: If they are found guilty.

[APPELLANT]: So you wouldn't—you wouldn't consider life without parole in that case?

[JUROR V.]: Oh, it depends.

[APPELLANT]: What does it depend on?

[JUROR V.]: What you hear during the trial.

[APPELLANT]: Well, just a second ago you were saying that everyone who is found guilty should automatically be put to death—found guilty of that crime should automatically be put to death and now you are saying that it depends—

[JUROR V.]: Maybe they should think twice before they shoot a—

[APPELLANT]: Right. But I am trying to get a sense. Do you feel—if someone is found guilty of that crime do you think that they should just automatically be put to death or would you consider other things?

[JUROR V.]: No.

[APPELLANT]: You would not consider other things?

[JUROR V.]: (shakes head)

[APPELLANT]: Okay. Thank you, [Juror V.].

(VIRT 1290-1291.)

Appellant subsequently used a peremptory challenge to excuse this juror. (VIRT 1313.) Appellant questioned two other jurors about their response to that same question. (VIRT 1292-1293, 1295.) At the conclusion of his questioning of the 18 prospective jurors the following exchange occurred:

[COURT]: Thank you, Mr. Mickel.

Counsel, on the issue of the Witt qualifying questions, do you want to pursue that any further? Am I clear on my point, Mr. Mickel.

[APPELLANT]: You mean more questioning for death qualifications with them?

[COURT]: Yes.

[APPELLANT]: No, I am through with that. Thank you.

(VIRT 1297.)

The parties then followed up with one juror regarding cases in which a police officer had been murdered. (VIRT 1297-1300.) Appellant challenged two jurors, on the grounds they were not qualified to be on a death penalty case. (VIRT 1300.) The court dismissed one juror, but rejected appellant's challenge as to the other. (VIRT 1301.) Juror Number 9466 replaced the juror who had been dismissed. (VIRT 1301.) Appellant subsequently used a peremptory challenge to excuse the juror that he had challenged as not qualified to be on a death penalty case, but had had his challenge rejected. (VIRT 1313.)

6. Facts pertaining to Juror Number 9466

Juror Number 9466 filled out the questionnaire as well. (37CT 10913.) Juror Number 9466 indicated in the negative in response to whether or not he/she would always vote in favor of or against the death penalty. (37CT 10913.) Juror Number 9466 responded with a "?" in response to whether a person should automatically be put to death if they are convicted of murdering a peace officer when the peace officer is engaged in the performance of his/her duties. (37CT 10913.) In response to Question 49, Juror Number 9466 indicated that he/she could impose either the death penalty or life in prison without the possibility of parole when it is alleged that Officer Mobilio was a peace officer who was engaged in the performance of his duties when he was murdered. (37CT

10915.) Juror Number 9466 further indicated he/she could see himself/herself rejecting the death penalty and choosing life in prison without the possibility of parole, or rejecting life in prison without the possibility of parole and choosing the death penalty. (37CT 10915.)

The court spoke to Juror Number 9466 directly:

[COURT]: Okay. Now, were you able to hear the discussion I was having with the jurors previously?

[JUROR NUMBER 9466]: Yes.

[COURT]: Any questions about any of those concepts we talked about?

[JUROR NUMBER 9466]: No.

[COURT]: Let me ask you six questions.

[JUROR NUMBER 9466]: Okay.

[COURT]: [Redacted Number Juror 9466], do you hold strong views in support of or in opposition to the death penalty as a punishment for murder?

[JUROR NUMBER 9466]: No.

[COURT]: Do you have an open mind on the death penalty determination?

[JUROR NUMBER 9466]: Yes.

[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; A death?

[JUROR NUMBER 9466]: Yes.

[COURT]: B, imprisonment for life without parole?

[JUROR NUMBER 9466]: Yes.

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

[JUROR NUMBER 9466]: No.

[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?

[JUROR NUMBER 9466]: No.

[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 a possible death penalty?

[JUROR NUMBER 9466]: No.

[COURT]: Okay. I have reviewed the questionnaire, I didn't see any particular issue there, but you can inquire, counsel.

[MS. STROM]: I don't either, your Honor, we'll pass.

[COURT]: You can inquire, Mr. Mickel, as to [Redacted Juror Number 9466]?

[MS. STROM]: No, your Honor.

[COURT]: Okay.

[MR. COHEN]: Excuse me, was there a challenge by the defense?

[APPELLANT]: No.

(VIRT 1301-1303.)

The Court then asked the parties if they wanted to question the jurors further, and both parties passed. (VIRT 1304.) In fact, in responding to the court appellant asked if he could have a moment, which the court granted, and then indicated he did not have any further questions. (VIRT 1304.) At that point the following exchange occurred:

[COURT]: Okay. That means both sides have passed these prospective 18 panelists for cause.

[APPELLANT]: Well, I did make—there was—there sustained a challenge that was—

[COURT]: You made a challenge under Witt standards to remove a panelist.

[APPELLANT]: Right.

[COURT]: The Court rejected that.

[APPELLANT]: Okay.

[COURT]: And other than that you are passing the remaining panelists recognizing you made that challenge that was denied by the Court?

[APPELLANT]: Right?

[COURT]: And the prosecution passes any further cause challenges?

[MS. STROM]: Yes.

[COURT]: And, to make it clear, that was—well, it could have been considered cause, that was a qualifying challenge under the Wainwright vs. Witt theory for death qualification, right?

[APPELLANT]: Right.

[COURT]: And other than that there are no challenges for cause from the defense?

[APPELLANT]: Right.

(VIRT 1304-1305.)

The parties moved to peremptory challenges. (VIRT 1306.) Appellant exercised one peremptory challenge and then passed twice. (VIRT 1307.) Appellant then exercised another peremptory challenge. (VIRT 1313.)

At that point Juror Numbers 12099 and 9719 were called and put on the prospective panel. (VIRT 1313.) The court asked the new members of

the prospective panel if they heard the previous discussion about how the legal system works and the presumption of innocence. (VIRT 1317.) Both Alternate Juror Number 12099 and Juror Number 9719 said there was nothing in that discussion that they felt they needed to address with the court. (VIRT 1317-1318, 1319-1320.)

7. Facts pertaining to Alternate Juror Number 12099

The Court had the following exchange with Alternate Juror Number 12099:

> [COURT]: [Redacted Juror #12099], do you hold strong views in support of or in opposition to the death penalty as a punishment for murder?
>
> [Redacted Juror #12099]: No.
>
> [COURT]: Do you have an open mind on the death penalty determination?
>
> [Redacted Juror #12099]: Yes.
>
> [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 #12099]: Yes.
>
> [COURT]: Imprisonment for life without parole?
>
> [Redacted Juror #12099]: Yes.
>
> [COURT]: Would you automatically vote for the death penalty in every case of murder in the first degree no matter what the evidence may be?
>
> [Redacted Juror #12099]: No.
>
> [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 #12099]: No.

[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 a possible death penalty?

[Redacted Juror #12099]: No.

(VIRT 1323.)

Alternate Juror Number 12099 filled out the prospective juror questionnaire as well. (37CT 10818.) Alternate Juror 12099 described himself as being moderately in favor of the death penalty. (37CT 10831.) As noted above, Question 39 stated, "Do you feel that the State of California should *automatically put to death* everyone who: ...." (37CT 10832.) Appellant responded in the affirmative when a person is convicted of multiple murder, and when a person, "Is convicted of murder plus the murder was of a peace officer while the peace officer was engaged in the performance of his duties." (37CT 10832.) Alternate Juror Number 12099 indicated that life in prison without the possibility of parole is worse for a defendant than death. (37CT 10833.) In response to Question 49, Alternate Juror Number 12099 indicated that he could impose the death penalty when it is alleged that Officer Mobilio was killed in the performance of his duties and the defendant knew or should have known that Officer Mobilio was engaged in the performance of his duties. (37CT 10834.) Appellant also indicated that he could not impose life in prison without the possibility of parole in such a case. (37CT 10834.) In response to Question 54, appellant answered in the negative to the following:

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?

(37CT 10834.)

The court specifically questioned Alternate Juror Number 12099 as follows:

[COURT]: Okay.

And, [Juror Number 12099], in your questionnaire, and Question 39 again: Do you feel the State should automatically put to death everyone who one is convicted of multiple murders? You said "yes". Talk to me about that.

[JUROR NUMBER 12099]: It is pretty much like what she said, if it is different occurrences. Like—um—just pretty much what she said. I am just a little out of it right now.

[COURT]: So what she said if there was a murder last year and a murder the year before now we're dealing with the third murder this year she thought that was a case that it should automatically be a death penalty case.

[JUROR NUMBER 12099]: Uh-huh.

[COURT]: Is that the case—kind of case you are talking about?

[JUROR NUMBER 12099]: Uh-huh.

[COURT]: "Yes"?

[JUROR NUMBER 12099]: Uh-huh.

[COURT]: You have to say "yes"—

[JUROR NUMBER 12099]: Yes.

[COURT]: —or "no" but don't say "uh-huh."

Okay. The next question, D, is the same automatic preamble. 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 and you said "yes". So talk to me about that.

[JUROR NUMBER 12099]: Well, uh, like, I believe that the police officer is there to just protect everyone else and once you deprive society of that—it depends on how the evidence is

shown to me and just the circumstances of the trial themselves and so I probably would say "no", I was probably—

[COURT]: So as you think about it right now you have to hear the facts?

[JUROR NUMBER 12099]: Going to the automatic, I would say "no".

[COURT]: So it is not an automatic?

[JUROR NUMBER 12099]: No.

[COURT]: You put that at high level of societal concern?

[JUROR NUMBER 12099]: Uh-huh.

[COURT]: Yes?

[JUROR NUMBER 12099]: Yes.

[COURT]: But it is not automatic?

[JUROR NUMBER 12099]: Yes.

[COURT]: Correct?

[JUROR NUMBER 12099]: Correct.

[COURT]: Now, I get to Question 54. Question 54 says: 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.

Now, the first sub part is: 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? And you checked "no". Talk to me about that one.

[JUROR NUMBER 12099]: I just believe the death sentence would be more appropriate, and it would also have to just go how the court is, but I have always leaned toward the death sentence more than without parole.

[COURT]: So preference. In a case where the prosecution is seeking a death penalty, if you believe there is a finding of guilt that death should be the inevitable result?

[JUROR NUMBER 12099]: Are you saying that—like—that would be my only option? Oh, no, I would consider both, but I would always lean more towards death.

[COURT]: Okay.

The prosecution to inquire on these issues?

(VIRT 1329-1331.)

8. Facts pertaining to Alternate Juror Number 9719

Alternate Juror Number 9719 filled out the questionnaire as well. (38CT 11092.) Alternate Juror Number 9719 indicated that he/she was moderately in favor of the death penalty. (38CT 11105.) Alternate Juror Number 9719 also indicated in the negative that he/she would not always vote for or against the death penalty if a person is found guilty of intentional first degree murder with a special circumstance. (38CT 11106.) Alternate Juror Number 9719 also stated that the State should automatically put to death everyone who is convicted of murder, multiple murders, and murder of a peace officer while the peace officer was engaged in the performance of his/her duties. (38CT 11106.) Alternate Juror Number 9719 also indicated that he/she thought that life in prison without the possibility of parole would be harder than death. (38CT 11107.)

Alternate Juror Number 9719 also indicated that if the murder alleged in this case was that Officer Mobilio was a peace officer killed while engaged in his duties, and the defendant knew or reasonably should have know that he was a peace officer, he/she could impose death penalty, or could impose life in prison without the possibility of parole, depending on the circumstances of the case and the evidence presented in the penalty phase. (38CT 11108.)

The court questioned Alternate Juror Number 9719.

[COURT]: And, [Juror #9719], do you hold strong views in support of or in opposition to the death penalty as a punishment for murder?

[Redacted Alternate Juror #9719]: No.

[COURT]: Do you have an open mind on the death penalty determination?

[Redacted Alternate Juror #9719]: Yes.

[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 Alternate Juror #9719]: Yes.

[COURT]: Imprisonment for life without parole?

[Redacted Alternate Juror #9719]: Yes.

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

[Redacted Alternate Juror #9719]: No.

[COURT]: Would you automatically vote against the death penalty in every case of murder in the first degree?

[Redacted Alternate Juror #9719]: No

[COURT]: No matter what the evidence may be?

[Redacted Alternate Juror #9719]: No.

[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 a possible death penalty?

[Redacted Alternate Juror #9719]: I might mention I don't know if I could be—I would try to be fair and impartial, but my

husband was murdered, my first husband, some years ago, in 1981. So I don't know if that would affect my—

[COURT]: Only you can tell us. You have discussed that in some length in your questionnaire. How do you think that would affect us with you being a trial juror?

[Redacted Alternate Juror #9719]: I am not sure if I could be balanced as far as yea or nay. I would hope that I could listen to the evidence and make a decision.

[COURT]: Okay. So are you talking about the issue of whether you could impose the death penalty or life without parole or are you talking about just the case being a fair juror?

[Redacted Alternate Juror #9719]: Right, just being a fair juror.

[COURT]: As far as the issue of death penalty you believe you can deal with that issue on a fairly rational basis?

[Redacted Alternate Juror #9719]: Yes.

[COURT]: And based on this case whether it could be life without parole?

[Redacted Alternate Juror #9719]: Yes.

[COURT]: You are more worried about your personal experience as a juror on the case itself?

[Redacted Alternate Juror #9719]: Yes.

[COURT]: Okay. Thank you.

(VIRT 1325-1327.)

The parties then had the opportunity to examine the jurors. (VIRT 1331-1332.) The prosecutor had the following exchange with Alternate Juror Number 9719:

[MS. STROM]: [¶.]

[Redacted Alternate Juror #9719], given—I understand you have a history or someone in your family has a history, I am

sorry about that. Now, given—even given those circumstances you wouldn't convict the defendant without finding it beyond reasonable doubt, would you?

[Redacted Alternate Juror #9719]: No.

[MS. STROM]: And would you weigh both of the options in terms of sentence?

[Redacted Alternate Juror #9719]: Absolutely.

[MS. STROM]: Do you think you could be fair in that regard?

[Redacted Alternate Juror #9719]: Uh-huh. Very.

[MS. STROM]: Thank you.

That is all I have, your Honor.

(VIRT 1331-1332.)

During that process appellant also examined Alternate Juror Number 9719. (VIRT 1333.)

[APPELLANT]: Okay. Thank you, [Juror C.]

And, [Juror #9719], and I am sorry to hear about your loss as well. And, I understand and I appreciate that in this case that you wouldn't find someone guilty if it wasn't proven beyond a reasonable doubt, but I was—I kind of wanted to know if there were—if there were kind of life-graphic details or sort of like alarming images along those kinds of lines in terms of that issue would that be overly distressing to you?

[Juror #9719]: After—I answered that incorrectly. I think you're really right. I think it might be. I remember I said "no"; then I thought about it afterwards.

[APPELLANT]: "No" you—do you think that that—do you think that that might effect your judgment in terms of being objective about—

[Juror #9719]: No, I don't think it would affect my judgment, it would just affect me personally, I think.

[APPELLANT]: But would the stress of having to go through that personally and go through that personal issue, how well do you think you would be able to handle that stress?

[Juror #9719]: I think I would be all right.

[APPELLANT]: And then also you answered that if a police officer testified that you would give their testimony more credibility. Could you explain to me what your position is on that?

[Juror #9719]: I would give it more credibility than not. I believe in law enforcement and police officers and what they are trying to do for everybody.

[APPELLANT]: Okay. And then there is a question about, that a defendant has the constitutional right not to testify and you said that if they didn't testify that you would feel they would be trying to hide something. So if a defendant didn't testify do you think that that would affect your judgment in terms of whether or not he was guilty or not?

[Juror #9719]: I think it might.

[APPELLANT]: Yes?

[Juror #9719]: Uh-huh.

[APPELLANT]: Okay. Thank you.

[COURT]: First, we have the issue to deal with—

Any further questions? Okay.

We're being invoked with *Wainwright v. Witt* issues as well as cause issues, so I understand that. Any further inquiry that you want to make on that issue before I call to the question? So to speak.

[MS. STROM]: Yes, your Honor.

As to the defendant testifying, whether or not they would testify, could you follow an instruction from the judge that says you are not to consider whether or not the defendant testifies?

[Redacted Alternate Juror #9719]: Yes

[MS. STROM]: Thank you.

[COURT]: Mr. Mickel?

[APPELLANT]: No, I don't have any questions, your Honor.

[COURT]: First issue is qualifying, death qualifying. Do you want to be heard, prosecution, as to the seven?

[MS. STROM]: No, your Honor.

[COURT]: As to the seven on the death qualifying question?

[APPELLANT]: No, your Honor.

[COURT]: As to the seven for cause?

[MS. STROM]: No, your Honor.

[COURT]: As to the seven for cause, Mr. Mickel?

[APPELLANT]: No, your Honor.

[COURT]: Okay.

When we called this last group of seven ladies and gentlemen forward, peremptories were with the defense. So both sides have passed cause and death qualifying and peremptories are now with the defense.

Anybody want to be heard on where I think we are procedurally?

(VIRT 1333-1335.)

Appellant then passed his next three peremptories. (VIRT 1336.) The prosecution passed their next peremptory and the panel was accepted. (VIRT 1336-1337.) The court then proceeded to the selection of the alternates. (VIRT 1337.) Appellant again passed his peremptory challenges and Juror Number 12099, Juror Number 9719, as well as one other, were selected as alternates. (VIRT 1337-1338.)

C. Appellant Did Not Challenge Any of the Jurors for Cause, and the Issue Is Therefore Forfeited

A defendant is entitled to challenge a juror for cause based on their views on capital punishment when the juror's views would prevent or substantially impair the performance of the juror's duties in accordance with the instructions and oath. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424; *People v. Moon* (2005) 37 Cal.4th 1, 13.) Appellant had the opportunity to challenge each of these jurors and chose not to, and declined to use a peremptory challenge to excuse them. "It has long been the rule in California that exhaustion of peremptory challenges is a 'condition precedent' to an appeal based on the composition of the jury. [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 315, quoting *People v. Coleman* (1988) 46 Cal.3d 749, 770.) Here, appellant did not exhaust his peremptory challenges. (VIRT 1336-1338.) Further, appellant failed to object to the jury as finally constituted, another requirement to overcome forfeiture. (*People v. Lucas*, *supra*, 12 Cal.4th at pp. 480-481.) Because appellant did not challenge any of these jurors for cause, exhaust his peremptory challenges, or object to the jury as constituted, the issue is not preserved for review. (*People v. Navarette* (2003) 30 Cal.4th 458, 489; *People v. Staten* (2000) 24 Cal.4th 434, 454; *People v. Lucas*, *supra*, 12 Cal.4th at pp. 480-481.)

The United States Supreme Court has also recognized that claims involving jury composition must be preserved on appeal. Generally, the Court has noted that a conviction would be reversed when a seated juror would automatically vote for the death penalty when the issue has been properly preserved. (*Ross v. Oklahoma* (1988) 487 U.S. 81, 85; *Morgan v. Illinois* (1992) 504 U.S. 719, 728-729.) More specifically, the Court found no fault with the Oklahoma rule that a defendant must exhaust his

peremptory challenges before challenging a court's denial of a motion to remove a juror for cause. (*Ross*, at pp. 89-90.)

Appellant acknowledges the he did not challenge these jurors for cause and did not exhaust his peremptory challenges. (AOB 173.) Appellant further acknowledges:

> 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.)

(AOB 173.)

Nevertheless appellant argues that there is an exception, articulated in *People v. Foster* (2010) 50 Cal.4th 1301 (*Foster*), in cases in which a seated juror is actually biased. (AOB 173-174.) Respondent disagrees that there is any potential exception that is applicable to appellant's case.

In *Foster*, among other issues, the defendant claimed the trial court's examination of the prospective jurors was inadequate to reveal bias and that there were jurors who were biased against him. (*Foster*, *supra*, 50 Cal.4th at p. 1322.) In its analysis the Court stated:

> Defendant did not object to the manner in which voir dire was conducted, nor did he indicate he believed the trial court should undertake examination in addition to the questions posed by the questionnaire and the unlimited questioning afforded defendant and the prosecution. Defendant therefore has forfeited his claim that the voir dire was inadequate.

(*Foster*, at p. 1324.)

Importantly, the Court then analyzed the claim on the merits, stating, "Defendant's claim also fails on the merits." (*Foster*, *supra*, 50 Cal.4th at p. 1324.) In its analysis therefore the Court chose to recognize that the defendant had forfeited the claim, and further that the claim would fail on the merits. The Court then addressed the remaining portion of the

defendant's claim regarding prospective jurors and in the portion of the opinion cited by appellant (AOB 174) stated:

> Finally, although 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, 117 Cal.Rptr.2d 45, 40 P.3d 754.)

(*Foster*, at p. 1325.)

Appellant relies on this passage to support an argument that:

> 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 [and] violated *Morgan v. Illinois*. (*People v. Foster*, *supra*, 50 Cal.4th at pp. 1326-1326.)

(AOB 176-177.)

The fact that the Court in *Foster* alternatively reached the merits in that case does not mean that appellant did not forfeit the claim in his case. It is certainly not uncommon for a reviewing court to recognize that a claim has been forfeited and then further note that the claim fails on the merits. Because appellant did not challenge any of these jurors for cause, exhaust his peremptory challenges, or object to the jury as constituted, the issue is not preserved for review. (*People v. Navarette*, *supra*, 30 Cal.4th at p. 489; *People v. Staten*, *supra*, 24 Cal.4th at p. 454; *People v. Lucas*, *supra*, 12 Cal.4th at pp. 480-481.)

Further evidence of these requirements to preserve a claim for review can be seen from the *Foster* Court's citation to *People v. Hillhouse* (2002) 27 Cal.4th 469. (*People v. Foster*, *supra*, 50 Cal.4th at p. 1325.) In *Hillhouse*, the defendant argued the trial court erred in denying his challenges for cause to five prospective jurors. (*People v. Hillhouse*, *supra*, at pp. 486-487.) The Court noted the claim was not preserved for appeal because the defendant did not exhaust his peremptory challenges and did not object to the jury as finally constituted. (*Id.* at p. 487.) The defendant further argued that one of the five persons was not only a prospective juror but ultimately was an actual juror. (*People v. Hillhouse*, *supra*, 27 Cal.4th at p. 487.) The Court stated:

> This circumstance does not change the rule. Defendant could have used a peremptory challenge to remove this juror but chose not to do so. Accordingly, defendant may not now complain that he was an actual juror.

(*Hillhouse*, at p. 487.)

The Court then chose to address the claim on the merits as if it had been cognizable on appeal stating:

> A party may challenge a prospective juror for actual bias, defined as a state of mind that would prevent that person from acting impartially and without prejudice to the substantial rights of any party. (*People v. Ayala* (2000) 24 Cal.4th 243, 271-272 [99 Cal.Rptr.2d 532, 6 P.3d 193].) On review of a trial court's ruling, if the prospective juror's statements are equivocal or conflicting, that court's determination of the person's state of mind is binding. If there is no inconsistency, the reviewing court will uphold the court's ruling if substantial evidence supports it. (*Id.* at p. 272.) Here, the juror's statements were equivocal and somewhat conflicting. Accordingly, we must defer to the trial court's determination of his state of mind.

(*People v. Hillhouse*, *supra*, 27 Cal.4th at p. 488.)

As a consequence, there are many instances in which a Court will recognize that an objection is required, but then choose to additionally

address the claims on the merits. That certainly does not mean that an objection is not required or that the peremptory challenges need not be exhausted before a claim is preserved for review. Here, appellant did not challenge any of these jurors for cause, exhaust his peremptory challenges, or object to the jury as constituted, and the issue is therefore not preserved for review. It is clear from the record appellant was aware he could question jurors on their responses to the questionnaire. As outlined above, appellant questioned Juror V. on her response to a question on the questionnaire, and subsequently dismissed her utilizing one of his peremptory challenges. (VIRT 1290-1291, 1313.) Appellant did not challenge any of these jurors for cause, exhaust his peremptory challenges, or object to the jury as constituted. As a consequence, his claim is not preserved and must be rejected.

D. Assuming for Sake of Argument the Claim Is Preserved, It Is Without Merit

Nevertheless, assuming for sake of argument that the claim is somehow preserved for review, it is without merit. Ultimately, appellant's claim focuses on Juror Numbers 7877, 7017, 10155, and 9466. (AOB 168.) Appellant contends that these jurors:

> all stated that they believed that the death penalty should automatically apply to a defendant who is convicted of murdering a police officer engaged 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 certain types of murder, will not "consider and weigh the mitigating evidence in determining the appropriate sentence."

(AOB 168, citation omitted.)

As outlined above, appellant did not challenge any of these jurors for cause, exhaust his peremptory challenges, or object to the jury as constituted. In fact, the crux of appellant's current argument is the response to the very question he advocated including on the questionnaire.[18] (9CT 2171-2174.) Nevertheless, assuming appellant had no further responsibility in the jury selection process as it relates to this claim, a careful review of the record reveals that these jurors were fully capable of performing their duties in accordance with the court's instructions and the oath. As a consequence, even if considered, appellant's claims are without merit.

The standard used for excusing a prospective juror for cause based on his or her views regarding capital punishment is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424; *People v. Clark* (2011) 52 Cal.4th 856, 895.) In *People v. Ghent* (1987) 43 Cal.3d 739, 767, California adopted the *Witt* standard as the test for determining whether a defendant's right to an impartial jury under article I, section 16 of the state Constitution was violated by an excusal for cause based on a prospective juror's views on capital punishment. (*People v. Thomas* (2011) 51 Cal.4th 449, 462; *People v. Moon*, *supra*, 37 Cal.4th at p. 13; *People v. Griffin* (2004) 33 Cal.4th 536, 558, disapproved on other grounds in *People v. Riccardi* (2012) 54 Cal.4th 758 [44, fn. 32].) The *Witt* standard also applies to someone excusable for bias in favor of the death penalty. (*People v. Danielson* (1992) 3 Cal.4th 691, 712-713, overruled on other grounds *Price v.*

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[18] Appellant acknowledged earlier in this argument that Juror Number 9466 actually responded to the question regarding automatically putting to death someone who was convicted of the murder of a police officer when the officer was engaged in the performance of his duties not in the affirmative or negative, but with a "?." (AOB 156; 37CT 10913.)

Superior Court (2001) 25 Cal.4th 1046, 1069.)

A prospective juror is biased and disqualified to serve only if his/her state of mind will prevent him/her from acting impartially and without prejudice to any party. (*People v. Carasi* (2008) 44 Cal.4th 1263, 1290.) A prospective juror who would invariably vote either for or against the death penalty because of one or more circumstances likely to be present in the case being tried, without regard to the strength of the aggravating or mitigating circumstances, is subject to challenge for cause. (*People v. Ledesma* (2006) 39 Cal.4th 641, 671.) But questions directed to juror's attitudes toward particular facts of a case are not relevant to the death-qualification process. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1217.)

The Court in *People v. Cash* (2002) 28 Cal.4th 703, 721-722, noted:

> Our decisions have explained that death-qualification voir dire must avoid two extremes. On the one hand, it must not be so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried. On the other hand, it must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented.

The standard of review for a ruling regarding a prospective juror's views on the death penalty is essentially the same as the standard for other claims of bias. (*People v. Schmeck* (2005) 37 Cal.4th 240, 262, abrogated on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 637-639.) Whether the contention is that the court erred in excluding prospective jurors who exhibited an anti-death bias, or erred in failing to exclude prospective jurors who exhibited a pro-death bias, the same standard applies. (*People v. Maury* (2003) 30 Cal.4th 342, 376; *People v. Bradford, supra*, 15 Cal.4th at p. 1318.)

Where the juror gives conflicting or equivocal responses the trial court is in the best position to evaluate the juror's responses, and its

determination as to his/her state of mind is binding on the appellate courts. (*People v. Carasi*, *supra*, 44 Cal.4th at p. 1290; *People v. Harris* (2005) 37 Cal.4th 310, 329; *People v. Cunningham*, *supra*, 25 Cal.4th at p. 975; *People v. Lewis* (2001) 25 Cal.4th 610, 631; *People v. Bradford*, *supra*, 15 Cal.4th at p. 1319.)

"Generally, the qualifications of jurors challenged for cause are matters within the wide discretion of the trial court, seldom disturbed on appeal." (*People v. Jones* (2003) 29 Cal.4th 1229, 1246.) It is within the broad discretion of the trial court to determine whether a prospective juror will be "unable to faithfully and impartially apply the law in the case before the juror." (*Id.* at p. 1247.)

A careful review of the record in this case reveals that each of the now challenged jurors were fully capable of performing their duties as a juror in accordance with the court's instructions and his/her oath. Importantly, each of these jurors was questioned by the court regarding his/her views on capital punishment. For example, when questioned by the court Juror Number 7877 indicated that he/she could consider death or life imprisonment without parole when someone is found guilty of first degree murder and a special circumstance is found to be true. (VIRT 1244-1245.) Juror Number 7877 also said he/she would not automatically vote for or against the death penalty in every case of murder in the first degree, no matter what the evidence might be. (VIRT 1244-1245.) Juror Number 7877 affirmatively indicated to the court that there was no reason he/she could not be fair and impartial or could not follow the court's instructions. (VIRT 1244-1245.) In response to Question 49 on the questionnaire, which specifically mentions that Officer Mobilio was a peace officer on duty, Juror Number 7877 indicated that he/she could impose either the death penalty or life in prison depending on the circumstances of the case and the

evidence in the penalty phase. (37CT 10723.) Juror Number 7877 also responded in the affirmative when asked:

> 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?

(37CT 10723.)

Importantly for appellant's purposes Juror Number 7877 had strong feelings regarding an individual's right to own guns, stating, "Every law abiding citizen should own guns." (37CT 10719.) Juror Number 7877 also indicated he/she had been in the NRA. (37CT 10719.) It is likely that appellant viewed individuals with strong feelings on the right to bear arms as sympathetic to his political views.

Juror Number 7877 did indicate in response to Question 39 that the State of California should automatically put to death everyone who was convicted of murder, convicted of multiple murder, and "Is convicted of murder plus the murder was of a peace officer while the peace officer was engaged in the performance of his duties." (37CT 10721.) But, these responses must be considered in the context of his/her responses to the other questions. This juror affirmatively indicated to the court that he/she would not automatically vote for or against the death penalty in every case of first degree murder. (VIRT 1244.) This juror also affirmatively indicated to the court that there was no reason he/she could not be fair and impartial and no reason he/she could not follow the court's instructions in a capital case. (VIRT 1244-1245.)

Similarly, Juror Number 7017 indicated that he/she had strong feelings on the private ownership or use of firearms in that it should be allowed. (38CT 10938.) Juror Number 7017 had also been a member of the NRA, but was not any longer. (38CT 10938.) When questioned by the court, Juror Number 7017 also indicated that he/she could consider death or

life imprisonment without parole when someone is found guilty of first degree murder and a special circumstance is found to be true. (VIRT 1250-1251.) Juror Number 7017 also said he/she would not automatically vote for or against the death penalty in every case of first degree murder, no matter what the evidence might be. (VIRT 1250-1251.) Juror Number 7017 responded, "I will follow the rules" when asked if there was any reason he/she could not be fair and impartial or could not follow the court's instructions. (VIRT 1250-1251.) Juror Number 7017 also said he/she had an open mind on the death penalty determination. (VIRT 1250-1251.)

As did Juror Number 7877, while Juror Number 7017 also indicated in response to Question 39 that the State of California should automatically put to death everyone who was convicted of murder, convicted of multiple murder, and "Is convicted of murder plus the murder was of a peace officer while the peace officer was engaged in the performance of his duties." (38CT 10940.) Juror Number 7017 also indicated that he/she could impose the death penalty and could impose life in prison without the possibility of parole where the allegation is that Officer Mobilio was a peace officer who was intentionally killed while engaged in the performance of his duties. (38CT 10942.) Juror Number 7017 stated that he/she could see himself/herself rejecting the death penalty and choosing life in prison without the possibility of parole, and rejecting life in prison without the possibility of parole and choosing the death penalty. (38CT 10942.)

Again, similar to Juror Number 7877, Juror Number 7017's responses to the questions must be considered as a whole. Each of these jurors was capable of following the court instructions and performing his/her duties as jurors consistent with the oath. The court and the parties were in the best position to determine these jurors' suitability to serve, and none of those present thought they were unqualified or unfit. For example, there are instances in the record where appellant and the prosecution stipulated that

particular jurors should be excused because they were not qualified to be jurors in a capital case. (VIRT 1261-1262.) It therefore appears that all of those present felt that these jurors were qualified to serve.

Similar to Juror Numbers 7877 and 7017, Juror Number 10155 indicated he had strong feelings about the private ownership of guns stating, "Ev[e]ryone has right to bear arms." (38CT 11077.) Juror Number 10155 did respond in the affirmative that the State should automatically put to death everyone who is convicted of multiple murder, and convicted of murder of a police officer in the performance of their duties. (38CT 11079.) In Question 49, Juror Number 10155 was asked if the murder alleged in this case was that Officer Mobilio was a peace officer engaged in the performance of his duties, and appellant knew or should have known that was the case. (38CT 11081.) Juror Number 10155 indicated that depending on the circumstances and evidence presented in the penalty phase, he/she could impose the death penalty, or could impose life in prison without the possibility of parole. (38CT 11081.) Juror Number 10155 also responded that given the two punishment options he/she could see himself/herself in the appropriate case rejecting the death penalty and choosing life imprisonment without the possibility of parole, or the other way around. (38CT 11081.)

Again, the court specifically addressed this juror regarding his/her views on the death penalty. When questioned by the court regarding his/her views on the death penalty, Juror Number 10155 assured the court that he/she had an open mind, could consider both death and life in prison without the possibility of parole when a person is found guilty of first degree murder and a special circumstance is found true. (VIRT 1273-1274.) Juror Number 10155 also said he/she would not automatically vote for or against the death penalty in every case of first degree murder no matter what the evidence might be. (VIRT 1273-1274.) Finally, Juror

Number 10155 said there was no reason why he/she might not be fair and impartial or might not be able to follow the court's instructions. (VIRT 1274.) As stated previously, given that the People and appellant had previously stipulated to certain jurors being excused, and the court ruling on prior challenges, it appears that all of those present felt that this juror was qualified to serve. (*See Wainwright v. Witt*, *supra*, 469 U.S. at pp. 430-431 [a federal habeas proceeding in which the Court observed that it was noteworthy that defense counsel did not object to juror's recusal or attempt rehabilitation].)

Finally appellant challenges Juror Number 9466. Juror Number 9466 responded negatively to whether or not he/she would always vote in favor of or against the death penalty. (37CT 10913.) Juror Number 9466 responded with a "?" in response to whether a person should automatically be put to death if they are convicted of murdering a peace officer when the peace officer is engaged in the performance of his/her duties. (37CT 10913.) In response to Question 49, Juror Number 9466 indicated that he/she could impose either the death penalty or life in prison without the possibility of parole when it is alleged that Officer Mobilio was a peace officer engaged in the performance of his duties when he was murdered. (37CT 10915.) Juror Number 9466 further indicated he/she could see himself/herself rejecting the death penalty and choosing life in prison without the possibility of parole, or rejecting life in prison without the possibility of parole and choosing the death penalty. (37CT 10915.)

Similar to the other challenged jurors, Juror Number 9466, when questioned by the court, indicated that he/she had an open mind on capital punishment and could impose either death or life in prison without parole, when a person is found guilty of first degree murder and a special circumstance is found true. (VIRT 1301-1303.) Juror Number 9466 also said he/she would not automatically vote for or against the death penalty in

every case of first degree murder no matter what the evidence might be. (VIRT 1301-1303.) Finally, Juror Number 9466 indicated that there was no reason why he/she would not be able to be fair and impartial or would not be able to follow the instructions. (VIRT 1301-1303.) Again it appears that none of those present felt this juror was not qualified. (*Wainwright v. Witt, supra*, 469 U.S. at pp. 430-431 [a federal habeas proceeding in which the Court observed that it was noteworthy that defense counsel did not object to juror's recusal or attempt rehabilitation].) Further, Juror Number 9466 affirmatively indicated to the court that he/she could be fair and impartial and could follow the court instructions. Appellant again fails to demonstrate bias.

Appellant contends that, "These jurors were subject to challenge for cause despite their further answers to questions 38 and 49." (AOB 168-169.) Specifically, appellant argues:

> 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.

(AOB 169.)

Question 38 stated:

> If the jury found 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?

(See 38CT 10940.)

Question 37 asked the related but opposite question with the wording "*always vote against death....*" (See 38CT 10940.) Each of the four challenged jurors responded to each of these questions in the negative. (37CT 10721, 10913; 38CT 10940, 11079.)

Appellant's argument is flawed because it isolates Question 38 and then argues that because of the responses to Question 39 the jurors made "crystal clear" that their willingness to consider alternate penalties did not apply when the special circumstance was the murder of a police officer. (AOB 169.) Appellant is incorrect.

Question 38, along with Question 37, and several others, including the verbal questions asked by the court, were designed to determine if an individual juror's views would prevent or substantially impair the performance of his/her duties as a juror in accordance with the instructions and the oath. Each of these jurors' responses to the questions demonstrated that none of them would always vote for or against the death penalty and all of them would follow the court's instructions and perform his/her duties consistent with the oath.

Question 39 stated:

> 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

(See 38CT 10940.)

While appellant's argument of course notes that this question specifically mentions a peace officer it fails to recognize that the wording of the questions asks the juror how he/she "feel[s]." This distinction while subtle is important. This question does not reveal a jurors unwillingness to follow the law or follow the court's instructions. An individual may well feel that every person who murders a peace officer while the officer is

engaged in the performance of his/her duties should be put to death, but still recognize their obligation to follow their oath as a juror, and the court's instructions, and the law of the state of California. In fact, that is what each of these jurors indicated in response to the court's questions to them.

In the questionnaire, Question 49 is the most factual and case specific of the group. Question 49 stated:

> The murder alleged in this case alleges the special circumstances that David Mobilio was a peace 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 the possibility of parole* in such a case? ☐ YES ☐ NO

(See 38CT 10942.)

Each of the challenged jurors responded in the affirmative to this question, indicating that they could impose either the death penalty or life in prison without the possibility of parole in such a case. (37CT 10723, 10915; 38CT 10942, 11081.) Further, each of them indicated that given that there are two punishments options available, and the jury was always given the option, each, in the appropriate case, could reject the death penalty and choose life in prison without the possibility of parole, or the other way around. (37CT 10723, 10915; 38CT 10942, 11081.) Each of these jurors, when their answers and responses to inquiries from the court and the parties are considered, was capable of performing their duties as a

juror in accordance with the instructions and the oath.[19]

As discussed above, appellant did not challenge any of these jurors for cause, exhaust his peremptory challenges, or object to the jury as constituted, and his claims are therefore not preserved for review. Further, each of them was capable of performing his/her duties in accordance with the instructions and oath. Appellant falls well short of demonstrating bias and his claim therefore fails.

VIII. THE TRIAL COURT APPROPRIATELY RULED APPELLANT COULD NOT PRESENT IRRELEVANT EVIDENCE

A. Summary of Argument

Appellant contends that the trial court's ruling regarding the presentation of his proposed "defense":

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[19] Alternate Juror Number 9719 also responded in the affirmative to Question 49 indicating that he/she could impose the death penalty or life in prison when the special circumstance was that Officer Mobilio was a peace officer killed in the performance of his duties and the defendant knew or should have known that was the case. (38CT 11108.) Alternate Juror Number 9719 further indicated that in the appropriate case he/she could reject the death penalty and choose life in prison without the possibility of parole, or the other way around. (38CT 11108.) Finally, in his/her verbal discussion with the court, this juror indicated that he/she did not have strong views in support of or in opposition to the death penalty, and had an open mind with regard to the penalty determination. (VIRT 1325-1326.) Further he/she stated that he/she could consider death or imprisonment for life without parole as a possible punishment, and would not automatically vote for or against the death penalty. (VIRT 1326.) This juror did indicate that a spouse had been murdered but that he/she could deal with the issue of punishment. (VIRT 1327.) When questioned by the prosecutor this juror indicated that even given that history, he/she would not convict someone without finding it beyond a reasonable doubt, and could be fair and weigh both options in terms of sentence. (VIRT 1331-1332.) Appellant questioned this juror as well. (VIRT 1333-1335.) Appellant did not challenge this juror for cause and did not exercise a peremptory challenge. (VIRT 1335-1336.)

> 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.

(AOB 178.)

But the simple fact is that appellant wanted to present evidence in the guilt phase that although he never met Officer Mobilio, had no issue with Officer Mobilio as an individual, felt threatened by him in any way, and had no reason to murder Officer Mobilio, did so to send a message to the American public. That evidence was not relevant in the guilt phase of the trial. The flaw in appellant's argument is that it fails to acknowledge that the evidence was not a "defense" at all. An attempt to send a message to the public by ambushing and murdering a police officer is not a valid recognized defense to a homicide in California.

Specifically appellant argues:

> 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."

(AOB 193.)

As will be discussed more fully below, the superior court's ruling regarding appellant's proposed "defense" was proper. The court's ruling was that it would not permit appellant to present irrelevant evidence. It did not prohibit or stop appellant from testifying or presenting evidence, merely that he could not provide testimony or evidence that was not relevant to the issues. Appellant's argument that the ruling somehow stopped him from testifying or presenting a valid defense is misplaced. The court's decision was a straightforward evidentiary ruling. Appellant then chose to present no further evidence. Any claim that he was somehow stopped from presenting a defense is without merit.

B. Relevant Facts

On March 1, 2005, at a pretrial hearing the court considered appellant's legal theory.

> [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 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 of 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 all 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.
>
> [APPELLANT]: I agree with you, Your Honor.
>
> If I can speak with my advisory counsel for a moment?
>
> [COURT]: Sure.
>
> (Brief discussion between the Defendant and advisory counsel.)

[APPELLANT]: I agree with what you said, Your Honor. And as you have, from reading what I have wrote—or written, the way that the proposed defenses that you feel that I may attempt to use, I can state at this point are not, neither one of those are a defense that I intend to use during trial. So with those being the defenses that you would have potential concerns about, I don't think that's really an issue, because I am not going to use those defenses, Your Honor.

[COURT]: Okay. Now I have—my concern expands. I have reviewed the proposed stipulations that you offered last time that were rejected, and that's within the right of the Prosecution to reject any and all stipulations as it is for you to reject their proposed stipulations. That it not an issue for me.

The issue for me is in light of what you indicate the proposed facts are by way of stipulation—

[APPELLANT]: Right.

[COURT]: —I'm very concerned as to what is going to be presented to this jury.

[APPELLANT]: Right.

[COURT]: And 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 trial, inadmissible evidence.

In light of those two proposed stipulations, I don't see any defense. So I am really struggling with what we are going to talk about and how it is going to be presented. And so I need some help here[.]

For example, before I could, in my own mind, seeing that you are telling me now that those two theories of corporate liability and a statement protesting police brutality, which were your Web postings, are not defenses that you intend to advance, based on your stipulation, I am kind of hard-pressed to see where the Defense is coming from.

What I don't want to do is have a situation where you would be subjected to what I think would be serious embarrassment if every time you tried to speak, there is an objection and a ruling. And I don't want to put your case through that. I think that's prejudicial to you. So I need to have some guidance here on where we are going with this defense.

[APPELLANT]: Right.

[COURT]: For example, if, in opening statement—I am really concerned about the opening statement. I would need to see where that goes; what is going to be included in the opening statement.

In examining witnesses, I don't need to know too much. You can ask the questions, and they can object, and I can rule. But if you elect to testify, I would have to have an offer of proof as to what you are going to testify to.

I think having you write down the questions and then answer the questions, I agree with you, that's really pretty cumbersome. 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 defenses 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.

[APPELLANT]: I can simply reiterate that the defenses that, as you have stated them, the defenses that you would potentially see me as using, I am not going to use. Other than that, my actual defense I don't think is going to actually be an issue until the Prosecution's case has been presented. And then I think that we can deal with it at that point.

[COURT]: What do we do with an opening statement, then?

[APPELLANT]: I am not entirely sure at this point how much of my actual defense I am going to address during my opening statements.

[COURT]: Well, I think I would be remiss in allowing you to make an opening statement to argue a defense that doesn't exist.

[APPELLANT]: Right.

[COURT]: So how am I going to deal with that?

[APPELLANT]: One moment, Your Honor.

(Brief discussion between the Defendant and his advisory counsel.)

Well, Your Honor, I don't feel that I am going to utilize my opening statements in a way that is going to make it an issue or a problem. I am not going to address those sorts of issues that are troubling the Court in a way that will make it a problem.

[COURT]: Okay. I am still troubled.

[APPELLANT]: Well, I understand that, Your Honor, and I think that is reasonable from your position. But I still feel that it is an issue that will come up after the prosecution has rested their case.

(IIIRT 664-669.)

On March 30, 2005, appellant filed a brief "Re Admissibility Of Defense, With Accompanying Proposed Order." (10CT 2355-2390, 2397a-2397b.) On that same day he also filed a "Brief re In Camera Hearing on Offer of Proof re Testimony." (9CT 2348.)

Prior to trial the court ruled that appellant was not required to inform the court of the content of his opening statement, but again admonished appellant on appropriately available defenses.

[COURT]: Okay. Let me just take a couple of things, one, just to get them so they are out of my purview.

We talked about Mr. Mickel's opening statement, and his defenses. It'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.

I will tell Mr. Mickel that the purpose of an opening statement is to explain to the jury what the evidence of the case is and not to try to garner sympathy, prejudice, not to espouse political causes. It is commonly, lawyers use the analogy of the road map of the case, where it is going, what the evidence is going to be. And if that is what you are going to do, then you are entitled to do that. And if you exceed those boundaries of no argument, no discussing the law, simply discussing the facts of the case, you can discuss the facts, but not the law or evidence, do it.

Do you want to be heard on that?

[MR. COHEN]: And in regard to the potential defense from Mr. McCrae?

[COURT]: I already told him that—I think I—I probably didn't make it clear. Obviously I didn't

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 as 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 do.

So I am just—And based upon the proposed offer to stipulate regarding the admission in that proposed offer as to Mr. Mickel's culpability for the offense itself, I think the defense becomes a big issue for me as to where it is going to go. So before we get to that, I would require an offer of proof as to what we are going to hear in the way of defense.

But up till that time, make your opening statement. If they object, I will stop you if you are doing something wrong. So you limit it to what anybody else would offer, and that's an overview of the case, not arguing the law, not asking for

sympathy, not discussing irrelevant materials, and not discussing theories of the defense that don't exist.

So that's what I'm going to do.

[MR. COHEN]: Judge, we appreciate your ruling and—

[COURT]: Thanks.

[MR. COHEN]: And I know Mr. Mickel is sitting about two feet from me. He is nodding his head, but I don't know if that is on the record or not. And we are concerned—

[COURT]: Do you understand that, Mr. Mickel?

[APPELLANT]: Oh, yes, I understand.

(VRT 996-998.)

Subsequently, appellant submitted two briefs to the court. The first was a, "Brief re In Camera Hearing on Offer of Proof re Testimony," and the second was, "Re Admissibility Of Defense, With Accompanying Proposed Order." (9CT 2348; 10CT 2355.) On April 1, 2005, appellant and his advisory counsel were present at an in-camera hearing. (VIIIRT 1819.) At the hearing appellant outlined his defensive theory.

[COURT]: And how was it directed to Officer Mobilio specifically other than he was the individual that was there?

[APPELLANT]: Well, it would be the same as—I asked Your Honor to take judicial notice of several facts regarding The Shot Heard 'Round the World in 1775.

The same argument or the same questions that Your Honor is asking me about police officers in general and Officer Mobilio specifically, that same argument and that same question can be made regarding resisting those specific Red Coats.

The same question is, the colonists who came to resist those Red Coats, have they ever had any specific contact with those Red Coats? Had they ever known them before? Had they ever had any personal interaction with them? The answer is no. But it 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 wrongfully imprison two people, and they were attempting to abridge and infringe and destroy the colonists' right to bear arms.

Does that—Have I clarified the issue, Your Honor?

[COURT]: I think I understand your point. So before the night in question of the 19th of November, 2002—I think that was the date.

[APPELLANT]: That's the date.

[COURT]: —had you ever seen Officer Mobilio before?

[APPELLANT]: No, I hadn't.

[COURT]: And did anyone express to you particular complaints or specific complaints to you about Officer Mobilio as a peace officer?

[APPELLANT]: No, they had not.

[COURT]: One thing you did do is you got me to reread the Constitution. I read both the California and the U.S. Constitution and the Bill of Rights carefully about 4:00 o'clock yesterday morning.

This is not a defense that is recognized in the State of California or anywhere in the United States.

[APPELLANT]: It's not an established defense that anyone has made before. It is a case of first impression.

But this defense is specifically guaranteed by the rights that are recognized in Article 1, Section 1 of the California Constitution.

(VIIIRT 1820-1821.)

Appellant also made the following statement:

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.

(VIIIRT 1827-1828.)

Ultimately, the court ruled as follows:

[COURT]: You are a fascinating individual. I think that your theories are interesting discussion.

I don't think they rise to the level of a defense in a criminal action, the political discussions, and they should have been left in a political forum. We are in a criminal court, and this is not a defense that I can instruct on in a criminal case. I can't do it, and I won't do it.

I read your brief carefully, and I have listened to your arguments. And it appears to the Court that the defense is a political statement. And I can't allow that because I can't allow defenses 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. And I would have to object to every single objection dealing with a theory that you have just advanced. So I don't think it is a recognized theory of defense.

[APPELLANT]: Okay. And that's your ruling, Your Honor?

[COURT]: That's the ruling.

[APPELLANT]: Okay. I accept that.

I feel very strongly that's an incorrect ruling and that you should not make that ruling. But I accept that that is your 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.

[COURT]: Okay. Do you want some time to think about that?

The record should reflect that Mr. Mickel is very emotional at this time.

If you want some time to reconsider that, you can have it, Mr. Mickel.

(Brief discussion between the Defendant and advisory counsel.)

[APPELLANT]: No. I think that—I think we are finished, Your Honor.

[COURT]: Okay. Let me ask you what "finished" means. The Defense is to begin Tuesday. Is there going to be any defense presented?

[APPELLANT]: No, Your Honor.

(VIIIRT 1829-1831.)

Appellant's closing argument in the guilt phase consisted of the following:

[APPELLANT]: Good Afternoon.

Now, Mr. Cohen was perfectly correct, nobody except for myself really understands why I took Officer Mobilio's life. And I wanted to spend the day today explaining that to you, but—and it wouldn't be appropriate to go into detail about any of that right now. But I would just reiterate, as I said before, the Judge has found that to be inadmissible, so I'm not allowed to talk to you about that during the guilt phase.

But I would say that with the evidence that's been put in front of you and without you guys hearing anything, anything

from me really or hearing anything to the contrary, 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.

Now, I wanted to explain it all to you today, but that's not going to happen, so I will just explain it to you during the penalty phase.

(VIIIRT 1891-1892.)

C. Discussion

As noted above, appellant contends that trial court's ruling prohibited him from testifying in his own defense. (AOB 178.) Appellant's argument is flawed in that the testimony he sought to admit did not pertain to any cognizable defense. In reality the trial court's ruling merely prohibited appellant from presenting irrelevant and inadmissible evidence. The testimony appellant purports to have been prohibited from offering was in no way a legal justification for Officer Mobilio's murder. In fact, appellant did not appear to plan to offer the testimony to exonerate his guilt, or as evidence of justification for Officer Mobilio's murder, but as a platform to advance an agenda. Appellant acknowledged that this was not a "defense" that had been made before. (VIIIRT 1821.) Because appellant's proposed testimony was at best an attempt at mitigation the court was correct to exclude it during the guilt phase of the trial.

Murder is the unlawful killing of a human being with malice. (§§ 187, subd. (a).) A murder that is willful, deliberate, and premeditated is murder in the first degree. (§ 189.) There are relatively few ways in which a homicide is legally justifiable. In 2002, section 197 read as follows:

Homicide is also justifiable when committed by a person in any of the following cases:

1. When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person; or,

2. When committed in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein; or,

3. When committed in the lawful defense of such person, or of a wife or husband, parent, child, master, mistress, or servant of such person, when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished; but such person, or the person on whose behalf the defense was made, if he was the assailant or engaged in mutual combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed; or

4. When necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed, or in lawfully suppressing any riot, or in lawfully keeping and preserving the peace.

Appellant's proposed testimony went to none of these categories of justifiable homicide and the court was correct to exclude it as irrelevant. The third category above is further divided into self-defense and imperfect self-defense. "For killing to be in self-defense, the defendant must actually and reasonably believe in the need to defend." (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) "To constitute 'perfect self-defense,' i.e., to exonerate the person completely, the belief must also be objectively reasonable." (*Ibid.*) "If the belief subjectively exists but is objectively unreasonable, there is 'imperfect self-defense,' i.e., 'the defendant is

deemed to have acted without malice and cannot be convicted of murder,' but can be convicted of manslaughter." (*Humphrey*, at p. 1082 (quoting *In re Christian S.* (1994) 7 Cal.4th 768, 783).) "Moreover, for either perfect or imperfect self-defense, the fear must be of imminent harm. 'Fear of future harm—no matter how great the fear and no matter how great the likelihood of the harm—will not suffice. The defendant's fear must be of imminent danger to life or great bodily injury.'" (*People v. Humphrey*, *supra*, 13 Cal.4th at 1082, italics omitted (quoting *In re Christian S.*, *supra*, 7 Cal.4th at p. 783, italics omitted.)

Additionally, in California there are some limited mental health defenses. The California Legislature abolished diminished capacity defenses. (§§ 25, 28.) "The express purpose of both statutes is to abolish the diminished capacity defense and eliminate the judicially created concept of 'non-statutory voluntary manslaughter.' [Citations.]" (*People v. Spurlin* (1984) 156 Cal.App.3d 119, 128.) Under California law "when an intentional killing is shown, malice aforethought is established.... [T]he concept of 'diminished capacity voluntary manslaughter' (nonstatutory voluntary manslaughter)...[citation] is no longer valid as a defense." (*People v. Saille* (1991) 54 Cal.3d 1103, 1114, internal citation omitted.) Although diminished capacity has been abolished, diminished actuality survives. (*People v. Steele* (2002) 27 Cal.4th 1230, 1253.) That is, the jury may generally consider evidence of voluntary intoxication or mental condition in deciding whether defendant actually had the required mental state for the crime. (*Ibid.*)

In the instant case none of the "evidence" appellant purportedly wanted to admit was remotely related to any recognized defense or justification for homicide. Further, appellant's purported "purpose" in murdering Officer Mobilio was not relevant to any of the justifications or theories of reduced responsibility for homicide. Appellant acknowledged

to the court he had never seen Officer Mobilio before he murdered him. (VIIIRT 1820-1821.) Further, nobody had expressed any complaints to him about Officer Mobilio as a peace officer. (VIIIRT 1820-1821.) Appellant acknowledged that this was not a "defense" that had been made before. (VIIIRT 1821.) The evidence was not relevant and the court was proper to exclude it.

Under Evidence Code section 210, relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." "Except as otherwise provided by statute, all relevant evidence is admissible." (Evid. Code, § 351; *People v. Williams* (2008) 43 Cal.4th 584, 633.) It has long been recognized that "[t]he trial court has considerable discretion in determining the relevance of evidence. [Citations.]" (*Williams*, at p. 634.)

The testimony appellant purports to have been prohibited from presenting was in no way a legal justification for Officer Mobilio's murder. Appellant did not plan to offer the testimony to exonerate his guilt, or as evidence of justification for Officer Mobilio's murder, but as a platform to advance a political agenda. Because appellant's proposed testimony was at best an attempt at mitigation the court was correct to exclude it during the guilt phase of the trial.

Further, even assuming for the sake of argument that the evidence had some relevance the court would have been proper to exclude it because it was more prejudicial than probative. Evidence Code section 352 accords the trial court broad discretion to exclude even relevant evidence "if its probative value is substantially outweighed by the probability that its admission will...create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." "Evidence is substantially more prejudicial than probative [citation] if, broadly stated, it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome'

[citation]." (*People v. Waidla* (2000) 22 Cal.4th 690, 724.) The trial court's ruling is reviewed under Evidence Code section 352 for an abuse of discretion. (*People v. Williams*, *supra*, 43 Cal.4th at pp. 634-635.)

As noted above, the purported testimony was not to exonerate appellant's guilt, or offered as evidence of a justification for Officer Mobilio's murder, but as a platform to advance an agenda. It was not probative of any valid or recognized legal defense or justification, and as result was more prejudicial than probative. At best appellant murdered Officer Mobilio in an extreme attempt to advance a personal agenda. Because it was not related to any cognizable defense its admission would have created a substantial danger of undue prejudice, of confusing the issues, and misleading the jury. It would therefore have been proper for the court to exclude it pursuant to Evidence Code section 352.

Finally, even assuming for sake of argument the evidence was relevant and should not have been excluded pursuant to Evidence Code section 352, appellant still cannot establish any prejudice. In determining whether a trial court's erroneous exclusion of evidence is prejudicial, the *People v. Watson* (1956) 46 Cal.2d 818, 837, standard is applied to determine whether it is "reasonably probable that had the evidence been admitted a result more favorable to [appellant] would have ensued." (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1179-1180.) Here, the purported evidence was not probative of justification for murder or reduced responsibility of guilt. Nevertheless, because this was a capital case appellant was permitted to present the evidence in the penalty phase. The jury returned a verdict of death, and therefore did not find the evidence to be compelling mitigation for appellant's actions. Appellant cannot therefore establish that it was reasonably probable that had the evidence been admitted in the guilt phase he would have obtained a more favorable verdict. Appellant therefore cannot establish prejudice.

Appellant contends that the trial court's evidentiary ruling deprived him of his federal constitutional rights and therefore, that the *Chapman*[20] beyond a reasonable doubt standard of prejudice applies. (AOB 202.) The law is well settled that even erroneous limitations placed on a defendant's right to present evidence generally do not constitute a deprivation of a defendant's constitutional right to present a defense. (See *People v. Boyette* (2002) 29 Cal.4th 381, 428 ["'Although completely excluding evidence of an accused's defense theoretically could rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense' [citation]"].) As discussed above, the evidence appellant purportedly wanted to present did not have any tendency to prove or disprove any cognizable defense or justification. The trial court's ruling did not deprive appellant of his right to present a defense or otherwise violate his federal constitutional rights. Accordingly, appellant's contention that the *Chapman* standard of prejudice applies to this claim is without merit. In any event, as discussed, the jury rejected appellant's evidence in the penalty phase and returned a verdict of death. The trial court's exclusion of the evidence was therefore harmless, even under the *Chapman* standard.

IX. CALIFORNIA'S CAPITAL SENTENCING SCHEME IS CONSTITUTIONAL AND THE PENALTY SHOULD BE AFFIRMED

Appellant alleges a number of "systematic (and previously rejected) claims relating to the California death penalty scheme which require a new penalty phase in his case...." (AOB 208.) Consistent with its holdings in prior cases this Court should reject each of these claims. In each instance in which appellant failed to object or request a clarifying instruction the claim is not preserved for review. (*People v. Rodrigues* (1994) 8 Cal.4th

[20] *Chapman v. California* (1967) 386 U.S. 18, 24.

1060, 1192.) Nevertheless, assuming for sake of argument the following claims are preserved for review, they are without merit.

A. Sentencing Factor(s) Are Not Unconstitutionally Vague

Appellant contends that the instructions permitted the jury to consider appellant's age (13CT 3564), and that this factor for consideration was unconstitutionally vague. (AOB 208-209.) As appellant acknowledges this argument has been previously rejected. (*People v. Ray* (1996) 13 Cal.4th 313, 358.) Respondent submits that in this respect *People v. Ray*, *supra*, 13 Cal.4th at page 358, was properly decided and appellant's claim should be rejected.

B. Capital Punishment Scheme Does Not Violate the Eighth Amendment

Appellant contends that California's capital punishment scheme violates the Eighth Amendment and fails to distinguish among defendant's who are sentenced to death and those who are not. (AOB 209.) As appellant acknowledges this argument has been previously rejected. (*People v. Schmeck*, *supra*, 37 Cal.4th at pp. 304-305, abrogated on other grounds as stated in *People v. McKinnon*, *supra*, 52 Cal.4th at pp. 637-639; *People v. Loy* (2011) 52 Cal.4th 46, 78-79.) Respondent submits that in this respect *People v. Schmeck*, *supra*, 37 Cal.4th at pages 304-305, and *People v. Loy*, *supra*, 52 Cal.4th at pages 78-79, were properly decided and appellant's claim should be rejected.

C. The Jury May Consider the "Circumstances of the Crime"

Appellant contends that section 190.3, subdivision (a), which permits a jury to consider the "circumstances of the crime" is applied in a manner that institutionalizes the arbitrary and capricious imposition of the death penalty. (AOB 209.) Appellant acknowledges this argument has been previously rejected. (*People v. Schmeck*, *supra*, 37 Cal.4th at pp. 304-305,

abrogated on other grounds as stated in *People v. McKinnon*, *supra*, 52 Cal.4th at pp. 637-639; *People v. Loy*, *supra*, 52 Cal.4th at pp. 78-79.) Respondent submits that in this respect *People v. Schmeck*, *supra*, 37 Cal.4th at pages 304-305, and *People v. Loy*, *supra*, 52 Cal.4th at pages 78-79, were properly decided and appellant's claim should be rejected.

D. Appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment Rights Were Not Violated

Appellant contends that the jury was not instructed that it must find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances. (AOB 209-210.) Appellant acknowledges this argument has been previously rejected. (*People v. Schmeck*, *supra*, 37 Cal.4th at p. 304, abrogated on other grounds as stated in *People v. McKinnon*, *supra*, 52 Cal.4th at pp. 637-639; *People v. Loy*, *supra*, 52 Cal.4th at p. 78.) Respondent submits that in this respect *People v. Schmeck*, *supra*, 37 Cal.4th at page 304, and *People v. Loy*, *supra*, 52 Cal.4th at page 78, were properly decided and appellant's claim should be rejected.

E. CALJIC No. 8.85 Does Not Violate Appellant's Constitutional Rights

Appellant contends that CALJIC No. 8.85 is flawed in multiple ways. (AOB 210.) Appellant acknowledges these arguments have been previously rejected. (*People v. Schmeck*, *supra*, 37 Cal.4th at pp. 304-305, abrogated on other grounds as stated in *People v. McKinnon*, *supra*, 52 Cal.4th at pp. 637-639; *People v. Ray*, *supra*, 13 Cal.4th at pp. 358-359.) Respondent submits that in this respect *People v. Schmeck*, *supra*, 37 Cal.4th at pages 304-305, and *People v. Ray*, *supra*, 13 Cal.4th at pages 358-359, were properly decided and appellant's claims should be rejected.

F. The Instructions Were Proper

Appellant contends that the instructions failed to inform the jury that even if they determined that the evidence in aggravation outweighed the evidence in mitigation, they could still return a verdict of life without parole. (AOB 210-211.) Appellant acknowledges this argument has been repeatedly rejected. (*People v. Smith* (2005) 35 Cal.4th 334, 370; *People v. Arias* (1996) 13 Cal.4th 92, 170-171.) Respondent submits that in this respect *People v. Smith*, *supra*, 35 Cal.4th at page 370, and *People v. Arias*, *supra*, 13 Cal.4th at pages 170-171, were properly decided and appellant's claim should be rejected.

G. Capital Punishment Scheme Does Not Violate Equal Protection

Appellant contends that California's death penalty scheme violates the Equal Protection Clause because it provides "significantly fewer procedural protections" for individuals facing a death sentence than those facing non-capital felonies. (AOB 211-212.) Appellant acknowledges this argument has been previously rejected. (*People v. Manriquez* (2005) 37 Cal.4th 547, 590; *People v. Loy*, *supra*, 52 Cal.4th at p. 79.) Respondent submits that in this respect *People v. Manriquez*, *supra*, 37 Cal.4th at page 590, and *People v. Loy*, *supra*, 52 Cal.4th at page 79, were properly decided and appellant's claim should be rejected.

H. California Capital Punishment Scheme Does Not Violate International Law

Appellant contends that California's death penalty scheme violates international law including the International Covenant of Civil and Political Rights. (AOB 212.) Appellant acknowledges this argument has been previously rejected. (*People v. Schmeck*, *supra*, 37 Cal.4th at p. 305, abrogated on other grounds as stated in *People v. McKinnon*, *supra*, 52 Cal.4th at pp. 637-639; *People v. Loy*, *supra*, 52 Cal.4th at pp. 78-79.)

Respondent submits that in this respect *People v. Schmeck*, *supra*, 37 Cal.4th at page 305, and *People v. Loy*, *supra*, 52 Cal.4th at pages 78-79, were properly decided and appellant's claim should be rejected.

CONCLUSION

Accordingly, respondent respectfully requests that this Court affirm the judgment and sentence.

Dated: September 6, 2012

Respectfully submitted,

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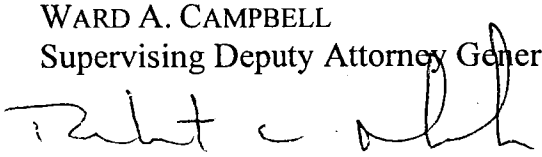

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13-point Times New Roman font and contains 56,885 words.

Dated: September 6, 2012

KAMALA D. HARRIS
Attorney General of California

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Mickel** No.: **S133510**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On September 11, 2012, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 11, 2012, at Sacramento, California.

_____
Declarant

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